Australia's "Bill of Rights"

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I. INTRODUCTION

Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit published one of the more talked-about books on American Constitutional law of 2018. Indeed, it even received mention during an unusually high-profile 2018 Supreme Court nomination hearing before the Senate Judiciary Committee, making Judge Sutton something of a celebrity outside of the American legal academy. An intriguing book, *51 Imperfect Solutions:*

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States and the Making of American Constitutional Law[1] both is, and is not, about "American" constitutional law. Let me explain.

Judge Sutton's thesis is rather simple: in telling the story of "American" constitutional law, and especially of the protection of liberty through enumerated rights, commentators "uniformly tell just one part of the story . . . omit[ting] two essentials."[2] The two essentials are, first, that the story of American constitutional law cannot be told by looking at the federal courts, and especially the Supreme Court of the United States, alone; "virtually all of the foundational liberties that protect Americans originated in the state constitutions and to this day remain independently protected by them."[3] And, second, that the landmark decisions of the Supreme Court cannot be understood in isolation; instead,

> [w]hen the National Court enforces a federal right, prior state court decisions in the area often influence the decision, whether on the ground that interpretations of the original state constitutional guarantees illuminate the meaning of the later federal provision or on the ground that the States' experiences are just as relevant, indeed more relevant, in the other direction.[4]

In other words, Sutton argues that fully to understand "American" constitutional law requires an understanding of both, and the interplay of, the federal U.S. Constitution and the constitutions of the fifty States.

Why does Sutton's proposal matter? Because it opens up a much wider scope of possible rights protection to redress violations of fundamental freedoms than one finds if restricted to the Federal Bill of Rights alone:

> American constitutional law creates two potential opportunities, not one, to invalidate a state or local law. Individuals who wish to challenge the validity of a state or local law thus usually have two opportunities to strike the law—one premised on the first-in-time state constitutional guarantee and one premised on a counterpart found in the U.S. Constitution.[5]

"Yet," Sutton argues, "most lawyers take one shot rather than two, and usually raise the federal claim rather than the state one."[6] In short, litigants deprive themselves of the full panoply of possible protection when claiming a violated right. Instead, Sutton proposes, because

> [t]he more difficult the constitutional question . . . the more indeterminate the answer may be . . . , it may be more appropriate to

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1. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

2. *Id.* at 1.

3. *Id.*

4. *Id* at 2.

5. *Id.* at 8.

6. *Id.*

> tolerate fifty-one imperfect solutions rather than to impose one imperfect solution on the country as a whole, particularly when imperfection may be something we have to live with in a given area.[7]

Thus, rather than "[a] single laboratory of experimentation for fifty-one jurisdictions," allowing the State courts to test remedies first within their systems would allow the U.S. Supreme Court the benefit of that experience before adopting similar solutions at the national level.[8] Put another way, taking this broad approach to American constitutional law allows for greater creativity and innovation in the protection of rights.

Reading Sutton has prompted me to think anew about the protection of fundamental human rights in Australia. Unlike all other western liberal democracies, Australia enjoys no comprehensive, entrenched protection of such rights in a bill of rights, either constitutional or legislative.[9] While I maintain that Australia needs a constitutionally-entrenched, comprehensive bill of rights, in making that claim, I fear that I, and many others who make the same argument, have overlooked something very important: Australia already *has* a bill of rights. It is not the sort of Bill that those in the United States, Canada, or even the European Union would recognize. Rather, it is more akin to the English Constitution—usually referred to as "unwritten," by which A.V. Dicey meant one that contains "two sets of principles or maxims of a totally distinct character."[10] The first set "[a]re in the strictest sense 'laws', since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common Law) are enforced by the Courts . . . ."[11] The second "consists of conventions, understandings, habits, or practices which . . . are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may . . . be termed . . . constitutional morality."[12]

In the same way as Dicey's unwritten constitution, Australian rights protection is piecemeal, drawn together from a range of disparate sources. I have always viewed this piecemeal approach as deficient, and I am not alone in seeing it that way.[13] But Sutton has encouraged me to consider a new perspective from which to view Australia's piecemeal approach to rights protection. Perhaps seeing it as piecemeal, and therefore deficient, is looking

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7. *Id.* at 19 (footnotes omitted).

8. *See id.* at 216.

9. Paul Babie & Neville Rochow, *Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU L. REV. 821, 822 (2010).

10. AV DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23 (8th ed. 1915).

11. *Id.*

12. *Id*.

13. *See, e.g.*, Gloria Kalache, *'A lot of Wrongs to Repair': Justice Michael Kirby Calls for National Bill of Rights*, SBS NEWS (May 29, 2019), https://www.sbs.com.au/news/a-lot-of-wrongs-to-repair-justice-michael-kirby-calls-for-national-bill-of-rights_2.

at things entirely the wrong way. It might be possible, although not optimal, that through a convergence of all of the various protections from a range of disparate sources, Australia does, in fact, have a complete coverage of a sort. Indeed, it may even be the case that what one finds in Australia provides even *greater* coverage than those jurisdictions that have a constitutionally-entrenched, comprehensive bill of rights and where litigants tend to put all of their "eggs" in one rights-protection constitutional "basket."

So here, in the spirit of Sutton's creativity and innovation in understanding what is necessary fully to understand a body of law, and in the spirit of Dicey's approach to what that content might include, I suggest that Australia does *already* have a bill of rights. It is not found in any one single document, but in many texts—international, national, and state—the product of constitutional, legislative, and judicial processes. Looking at the field creatively and innovatively, as Sutton would urge, we can see a bill of rights that consists, in the spirit of Dicey as a matter of content, of both "law"—a convergence of sources (the *Constitution of Australia*, at least one State constitution, Commonwealth (federal government), State, and Territory human rights legislation, and common law canons of statutory interpretation)—and a "morality" or as I will call it here, an ethos of rights protection.

My approach is not unheard of. In Canada, where there exists a comprehensive, national, constitutionally-entrenched bill of rights in the Canadian Charter of Rights and Freedoms,[14] scholars have recently begun to examine the ways in which human rights and anti-discrimination legislation, including Federal and Provincial enactments, might work with the Charter to expand the protection of human rights available to those claiming a violation.[15] In summarizing that protection, Peter Bowal and Dustin Thul write that:

> The merely statutory (ie. not constitutional) human rights Bills and Acts and the constitutionally-entrenched Canadian Charter of Rights and Freedoms share similar origins, purposes and language. It is not surprising, therefore, that they overlap to a considerable extent. Yet, there are still some interesting differences in scope and content. In numerous small ways, the provincial legislation actually reaches farther [sic] and is more generous than the Canadian Charter in conferring human rights and freedoms.[16]

14. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

15. *See* Peter Bowal & Dustin Thul, *Bills of Rights in Canada,* LAW NOW (Jan. 1, 2013), https://www.lawnow.org/bills-of-rights-in-canada/; John Hucker, *Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality*, 19 HUM. RTS. Q. 547, 548 (1997).

16. Bowal & Thul, *supra* note 15 at 3; *see also* Hucker, *supra* note 15, at 551–52.

This is not unlike Sutton's approach, which takes an expansive view of "American" constitutional law—it is more than just the United States Constitution. Similarly, it is not unlike the approach taken by Dicey to the English "Constitution"—it is more than a written text, including both "laws" and "morality." What Bowal and Thul argue is that human rights protection is found in the convergence of Canadian federal and provincial law, constitutional and legislative. I suggest in this Article that the same is true of Australia, and that it is a well-known fact.[17] However, I also suggest that there is more than meets the eye, that thinking *creatively* and *innovatively* allows us to see *also* a "bill of rights"—what I will call an Australian Bill of Rights (or "ABoR"). My project is both descriptive, in the sense that every component of this ABoR does, in fact, exist in law, and normative, in the sense that it requires us to think creatively and innovatively to combine them the way I do here, so as to form a bill of rights.

Thus, in the spirit of Sutton and Dicey, I offer an outline of what the ABoR might actually look like, of its contours, if we collect together each of its disparate, piecemeal elements. The ABoR consists of four components, and the remainder of this Article deals with each. Part I outlines an interpretative approach which I suggest already lurks within the protection of rights, such as it is, in Australia. I call this an ethos of rights protection, and it is found in both international and Australian law. It is balanced by an understanding that whatever rights might be, they are not absolute or unlimited. Instead, they may, indeed must, be limited in some circumstances. That, too, is part of an interpretative technique already being practiced by Australian judges when they elaborate and apply the rights already found in Australian law. Part II sets out the content of the rights protected by ABoR, found in the Commonwealth and in at least one State constitution, and from Commonwealth, State, and Territory legislation. To guide my analysis, I focus on those rights protecting the freedom of religion or belief ("FoRB"). This Part is not intended to provide a full historical or analytical account of each rights regime that I suggest forms a part of the ABoR. To the extent that historical or contextual background is necessary, I identify it in the footnotes so as to allow readers so inclined to explore it. My objective here, in the spirit of creativity and innovation, is to combine the Australian rights-protecting sources in a novel way, in what I call the ABoR. This combination of the sources is both descriptive and normative; this provides this Article's novel contribution. In Part III, I outline the remedies available to redress violations of the human rights found in the ABoR. The Conclusion offers a summary of the ABoR and a sole concluding reflection on it: while it is not perfect, comprehensive, or constitutionally-entrenched, it ***is*** a bill of rights.

17. *See* Babie & Rochow, *supra* note 9, at 832–33, 835.

II. INTERPRETATIVE APPROACH

American constitutional law contains no shortage of techniques for interpreting the provisions of the *Constitution*, especially those of the *Bill of Rights*.[18] While there are certainly similar methods of constitutional interpretation in Australia,[19] because of the lack of rights protection either in the Constitution or in legislation, those methods do not apply to the way in which such rights are protected in Australian law. Instead, there exists—as important context to and thus as a part of the constructed ABoR proposed in this Article—an interpretative approach that encompasses an understanding of human rights protections. It consists of two components. First, in describing the unwritten English Constitution, Dicey referred to its "morality."[20] In the Australian human rights setting, I argue that there exists an unwritten "ethos of human rights respect and protection" or an "ethos of rights." Second, to balance this ethos, there also exists an acceptance of restraint or limitation as an inherent aspect of the protection of those rights that can be found in the ABoR.

A. Ethos of Rights

What I call an ethos of human rights respect and protection can be found in two sources, one international and one domestic.

1. International

Australian law recognizes the validity of "borrowing" approaches to rights from international and other domestic legal systems.[21] This is not unusual.[22] The ABoR begins with such a borrowing, from international law. A collection of five international human-rights instruments together comprise what has come to be known as the "International Bill of Human Rights," which sets out those rights and freedoms declared to be enjoyed by all human beings the world over:[23]

- Universal Declaration of Human Rights (1948) ("UDHR");[24]

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18. *See generally* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3rd ed. 2000); 2 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2nd ed. 1988).

19. *See generally* JOHN PYKE, GOVERNMENT POWERS UNDER A FEDERAL CONSTITUTION: CONSTITUTIONAL LAW IN AUSTRALIA (2017).

20. DICEY, *supra* note 10, at 23.

21. *See* Jemimah Roberts, *Constitutional 'borrowing' and freedom of expression: Can Australia learn from the US First Amendment?*, 44 ALT. L. J. 56 (2019).

22. *See* GLOBAL RESEARCH CTR., LAW LIBRARY OF CONGRESS, THE IMPACT OF FOREIGN LAW ON DOMESTIC JUDGMENTS 2 (2010); Murray Gleeson, C.J. of Austl., Address at the Australian Bar Association Conference Paris: Global Influences on the Australian Judiciary (July 8, 2002), available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_global.htm; Stephen C. McCaffrey, *There's a Whole World Out There: Justice Kennedy's Use of International Sources*, 44 MCGEORGE L. REV. 201 (2013).

23. William Shrubb, *40 years of the ICCPR*, AUSTL.'S MAGNA CARTA INST.: RULE OF L. EDUC. (Mar. 23, 2016), https://www.ruleoflaw.org.au/40-years-iccpr/.

24. G.A. Res. 217 A.

- International Covenant on Civil and Political Rights (1966) ("ICCPR");[25]
- International Covenant on Economic, Social and Cultural Rights (1966) ("ICESCR");[26]
- Optional Protocol to the International Covenant on Civil and Political Rights ("OPICCPR")[27] and the
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ("OPICESCR").[28]

Four reasons could be given for why these instruments might mean little in the Australian setting. First, while it may now form part of customary international law, the UDHR is not a treaty and therefore fails directly to create any domestic legal obligations for Australia. Second, due to a number of reservations,[29] despite signing and ratifying it, Australia has never adopted the ICCPR into domestic law. However, it is scheduled to the *Australian Human Rights Commission Act 1986* (Cth), and as such, the Australian Human Rights Commission is responsible for monitoring Australia's compliance. Third, while Australia agreed to be bound by the First Optional Protocol to the ICCPR (allowing the United Nations Human Rights Committee to hear complaints from individuals who allege rights violations by the Australian Government), such findings are unenforceable. Finally, while Australia has agreed to be bound by the ICESCR, it too, does not form part of Australia's domestic law, nor is it scheduled to, or declared under, the *Australian Human Rights Commission Act 1986* (Cth).[30]

Given their limited formal applicability to Australia, and the consequent inability of those whose rights have been violated to seek redress for such intrusions pursuant to the International Bill of Human Rights, why should we care about it? Put another way, how can this loose collection of international human rights instruments constitute a component part of the ABoR? Simply because the International Bill of Human Rights "has still been a powerful force for upholding and improving the rule of law" worldwide,[31] demonstrating an approach to human rights, and especially to the key rights

25. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

26. International Covenant on Economic, Social and Cultural Rights, art. 27, *opened for signature* Dec. 26, 1966, 993 U.N.T.S 3 (entered into force Jan. 3, 1976).

27. Optional Protocol to the International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 6, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

28. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 2, *opened for signature* September 24, 2009 (entered into force 5 May 2013) [hereinafter OPICESCR].

29. *See* ICCPR, *supra* note 25.

30. AUSTL. HUM. RTS. COMM'N, HUMAN RIGHTS EXPLAINED: FACT SHEET 5: THE INTERNATIONAL BILL OF RIGHTS (2009), available at https://www.humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS5_International.pdf.

31. Shrubb, *supra* note 23.

of fair trial,[32] equal protection of the laws,[33] and the freedoms of speech,[34] assembly,[35] and association.[36] This "give[s] it a persuasive influence on countries around the world to protect and defend key rule of law principles."[37] I call this an ethos of human rights respect and protection, or simply an ethos of rights.

While it is not binding, this ethos nonetheless forms an important background to the way individual and collective rights are understood and ought to be protected in the world today, including in Australia. A decade ago, Michael Kirby wrote in words as profound today as then: "[i]n this little planet, we are all ultimately bound together. Diminution in the human rights of others endangers peace and security elsewhere and offends the sensibilities of people everywhere, who are increasingly well informed on such matters."[38] And when such sensibilities are offended, the law can react either formally or it can drive "legal creativity . . . the ultimate question [of which] is whether judges and other lawyers, trained until now to think strictly in jurisdictional terms, can adapt their minds to a new way of thinking that is harmonious to the realities of the world about them."[39] I suggest that this ethos of rights binds together the disparate components of the ABoR. But there is also a domestic source for this ethos, one that is often overlooked: the *Commonwealth Constitution*.

2. Commonwealth

It is today taken as axiomatic that the express rights scattered throughout the *Commonwealth Constitution*[40] are nothing more than narrow limitations on the legislative power of the Commonwealth.[41] It was not always so. In the early history of Federation, the Judicial Committee of the Privy Council, while still the final court of appeal for Australia, suggested that those scattered offerings found in the *Constitution* were in fact guarantees of individual rights:

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32. ICCPR, *supra* note 25, at art. 14.1.

33. *Id.* at art. 2.1, 3, 26; OPICESCR, *supra* note 28 at art. 2.1, 3.

34. ICCPR, *supra* note 25, at art. 19.

35. *Id.* at art. 21.

36. *Id.* at art. 22; *See Rights and freedoms: right by right*, AUSTL. HUM. RTS. COMM'N, https://www.humanrights.gov.au/our-work/rights-and-freedoms/rights-and-freedoms-right-right (las visited Jan.2, 2020).

37. Shrubb, *supra* note 23.

38. Michael Kirby, *Domestic Implementation of International Human Rights Norms*, 5 AUSTL. J. HUM. RTS. 109, 124 (1999).

39. *Id.* at 125.

40. *Australian Constitution* ss 51(xxxi), 80, 92, 116, 117.

41. *See* Paul Babie, *The Concept of Freedom of Religion in the Australian Constitution: A Study in Legislative-Judicial Cooperative Innovation*, QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 259 (2018); Paul Babie, *National Security and the Free Exercise Guarantee of Section 116: Time for a Judicial Interpretive Update*, 45 FED. L. REV. 351 (2017).

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that "in interpreting a constituent or organic statute such as the Constitution . . . that construction most beneficial to the widest possible amplitude of its powers must be adopted . . . . But that principle may not be helpful, where the section is . . , a *constitutional guarantee of rights*, analogous to the guarantee of religious freedom in sec. 116, or of equal right of all residents in all States in sec. 117.[42]

In other words, before the High Court seized control over the direction of the scattered rights found in the *Constitution* and converted them into limitations on power rather than guarantees of fundamental human rights, the work of the Framers seemed to provide individual guarantees, albeit in a haphazard and non-comprehensive way.

This seems to have been the view taken at least until 1967, if not longer, when Geoffrey Sawer, one of the foremost constitutional scholars in the history of federation, published *Australian Federalism in the Courts*.[43] Sawer specifically referred to the express rights provisions in the Constitution as "fundamental guarantees," although adding that "the most important of these are not primarily concerned with individual liberties, but with preserving the federal structure against autarchic or discriminating practices by government."[44] Further, Sawer added that "the only sections which are specifically in the form of individual guarantees are 80 [trials on indictment by jury] and 116 [enjoining a policy of religious toleration]."[45] Note, though, that Sawer does refer to all of the rights-protecting provisions as "guarantees," not limitations on power.

Moreover, Sawer titled Chapter 10, devoted to the rights expressly enumerated in the Constitution, "The Freedoms,"[46] adding that "[s]uch *individual guarantees* as the Commonwealth Constitution contains either do not affect the States, or do so in a manner having very little impact on them."[47] Sawer then examines the "religious guarantees" of § 116,[48] the "guarantee of

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42. *James v Commonwealth* (1936) 55 CLR 1, 43–4 (Austl.) (speech of Lord Wright M.R.) (emphasis added) (citations omitted).

43. GEOFFREY SAWER, AUSTRALIAN FEDERALISM IN THE COURTS (1967).

44. *Id.* at 18–9.

45. *Id.* at 19.

46. *Id.* at 168.

47. *Id.* (emphasis added).

48. *Id.* at 168–71.

equal treatment for British nationals" of § 117,[49] and the "guarantee of freedom of interstate trade and intercourse" of § 92.[50] In each case, Sawer refers to these provisions as "guarantees" and not as limitations on power. And it is a distinction with a difference, for in referring to § 51(xxxi), Sawer writes that this

> provision is not in the form of a fundamental guarantee, like the Fifth Amendment to the Constitution of the United States; it is part of the definition of the particular power, so that other powers involving acquisition and in particular powers outside S. 51 could conceivably be interpreted as free from this requirement.[51]

The point I want to make here is simply this: in looking at the rights provisions expressly enumerated in the *Constitution*, Sawer thought he was looking at "freedoms"—at "fundamental guarantees." And so, the *Constitution*, at least at the time Sawer wrote, was seen to contain what I would call an ethos of rights protection, limited though it may be.

And this may be the way in which Sawer meant that the rights enumerated in the *Constitution* might affect the States—not in direct application against them, but in the way their actions are understood in the context of fundamental human rights. I have suggested elsewhere means by which interpretations of the Constitution might be altered;[52] I suggest that the ethos of which Sawer wrote in 1967 remains there, available for use in the contemporary interpretation and application of those rights, and as a means of thinking more broadly about human rights in Australia, both at the Commonwealth and at the State level.

But even if that opportunity remains unrealized, the *Constitution* in any case does more than provide a narrow ethos in respect of the rights expressly enumerated in its text; and that is found, at least as late as 1987, in the approach of Justice Lionel Murphy, perhaps the foremost, at least in some eyes (mine among them), expositor of the fundamental human rights contained in the *Constitution*. In fact, the limited ethos has been considerably expanded by Justice Murphy and, since his death, by the High Court's acceptance of "implications" in the text of the *Constitution*. It was Justice Murphy who gave fullest expression to the fact that "[t]he Constitution is a framework for a free society."[53] And, so:

> Traditionally, constitutions are instruments which briefly state the framework of government, the political divisions and organs, their composition, functions and interrelations, and sometimes specific

49. *Id.* at 171–2.

50. *Id.* at 174–95.

51. *Id.* at 172.

52. *See* Babie, *National Security and the Free Exercise Guarantee of Section 116*, *supra* note 41.

53. *Seamen's Union of Australia v Utah Dev Co* (1978) 144 CLR 120, 158.

> guarantees of human rights. Because of the brevity of constitutions, implications are a prominent feature in the history of their judicial interpretation. The Australian Constitution does not express all that is intended by it: much of the greatest importance is implied. Some implications arise from consideration of the text; others arise from the nature of the society which operates the constitution. Constitutions are designed to enable a society to endure through successive generations and changing circumstances. . .
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> A constitutional principle, such as responsible government, may even appear inconsistent with the written text, nevertheless it operates . . . Even where specific rights are spelled out, for example, in the United States Constitution, there may remain others which are implied . . .
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> …
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> The history of interpretation of the Australian Constitution shows that implications have been freely made. Implications of federalism, in particular of intergovernmental immunity, have been made, but these are not the only possible implications.
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> In my opinion, other constitutional implications which are at least as important as that of responsible government, arise from the nature of Australian society. The society professes to be a democratic society—a union of free people, joined in one Commonwealth with subsidiary political divisions of States and Territories. From the nature of our society, an implication arises prohibiting slavery or serfdom. Also from the nature of our society, reinforced by the text…in my opinion, an implication arises that the rule of law is to operate, at least in the administration of justice. Again, from the nature of our society, reinforced by parts of the written text, an implication arises that there is to be freedom of movement and freedom of communication. Freedom of movement and freedom of communication are indispensable to any free society. . . The implication raised is not of absolute freedom, but it is at least freedom from arbitrary interference.[54]

Murphy found, implied in the *Constitution*, fundamental rights, based upon the democratic principle. He elaborated upon one of those rights, the freedom of political communication, in *Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth*:

> Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative

54. *McGraw-Hinds (Austl) Pty Ltd v Smith* (1979) 144 CLR 633, 668–70 (Austl.).

> government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States… From the [express] provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution…. The freedoms are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation to the extent made necessary by physical limits upon the number of stations which can operate simultaneously). The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.[55]

But these implications were recognized long before Murphy. Helen Irving writes that:

> In his 'Message to the Australian People' on the day of the Commonwealth's Inauguration, Edmund Barton, the freshly anointed Prime Minister, described what he considered to be 'the main principle of the Commonwealth' expressed in its Constitution: 'Its representation in one House bespeaks justice to the individual; its representation in the other bespeaks equal justice to each State. It will, and must be, the aim of the Government of the Commonwealth to give complete effect to both of these principles.'[56]

Certainly, in referring to those "freedoms so elementary that it was not necessary to mention them in the Constitution," Justice Murphy sought to give effect, as an implication of the text, to this "main principle" enunciated by Barton, one of the framers and the first Prime Minister, under the new *Constitution*. While Justice Murphy would never live to see this vision of the *Constitution* realized, the High Court recognized, and continues to recognize

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55. *Ansett Transp Indus (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88 (Austl.) (citations omitted).

56. HELEN IRVING, TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIA'S CONSTITUTION 169 (1999); *see* HARRISON MOORE, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 329 (1902).

to this day, the existence of an implied freedom of political communication,[57] as well as a right to vote,[58] and, possibly, a right to procedural fairness.[59]

The importance of Justice Murphy's approach to implications is not so much the nature of the rights to which it gives rise—we will return to that later—but instead, the interpretative approach to the *Constitution* as whole, and to the way in which we view human rights in Australia; it must be understood not only in what it says expressly, but what it *implies* as well. What it implies is an ethos of human rights respect and protection. This ethos is there in the very fabric of the *Constitution*, in its text and in what that text implies.

Lest one think that this draws a rather long bow in suggesting that there is an ethos of rights in the implications of the *Constitution*, listen to these words of Michael Kirby, a radical like Justice Murphy, but one who has become rather mainstream, recalling that:

> Murphy often told me that he left a copy of the Constitution beside his bed at night, in case sleeplessness should strike him and he had yet another chance to look into its language to discover its implications. To him, finding implications in the language and structure of a document, such as the Constitution, was elementary lawyering. At the time that he first expressed his views on constitutional implications they were dismissed as 'quaint'. Yet within little more than a decade other judges were peering into the text…and finding implications of free speech or explicit promises of equal treatment of citizens throughout the nation and of jury trial and other rights which previous decisions of the High Court had denied.[60]

What emerges, then, is both an international and an Australian ethos of rights, applicable to both the enumerated and the implied rights found in the *Constitution*, and to the way we understand rights generally in Australia. It is not formal positive law, but it is an important interpretative guide to approaching human-rights protection in Australia.

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57. *See Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Austl.); *Australian Cap Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broad Corp* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1 (Austl.); *APLA Ltd v Legal Servs Comm'r (NSW)* [2005] HCA 44 (Austl.); *Unions NSW v New South Wales* [2013] HCA 58 (Austl.); *Hogan v Hinch* [2011] 243 CLR 506 (Austl.); *A-G (SA) v Corp of Adelaide* [2013] HCA 3 (Austl.); *McCloy v New South Wales* (2015) 257 CLR 178 (Austl.); *Brown v. Tasmania* [2017] HCA 43 (Austl.); *Clubb v Edwards* [2019] HCA 11 (Austl.); *Preston v Avery* [2019] HCA 11 (Austl.); *Comcare v Banerji* [2019] HCA 23 (Austl.).

58. *Roach v Electoral Comm'r* (2007) 233 CLR 162 (Austl.); *Rowe v Electoral Comm'r* (2010) 243 CLR 1 (Austl.).

59. *See* GEORGE WILLIAMS & DAVID HUME, HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION 375 (2nd ed. 2013).

60. Michael Kirby, *Foreword* to JENNY HOCKING, LIONEL MURPHY: A POLITICAL BIOGRAPHY, at iii-xii, ix (2000).

B. Restraint

An ethos cannot, of course, create binding obligations; as such, it must find its way into an approach for protecting rights at the domestic level. That approach exists, but before turning to that, it is worth considering an important two-part counterweight to the ethos that emerges from the approach to fundamental human rights protection found both in international law and in national or quasi-national constitutional documents. First, no right is absolute. In *Cantwell v. Connecticut*, Justice Owen Roberts wrote of the free exercise protection of the First Amendment, that "in the nature of things,…[it] cannot be [absolute]."[61] And, of course, there may therefore be instances in which the liberal democratic state might, for good reasons relating to the collective or community interest, impose justifiable limitations upon a right in the pursuit of legitimate state objectives. Indeed, in interpreting the Australian counterpart to the free exercise guarantee, Chief Justice John Latham wrote that it must be "possible to reconcile religious freedom with ordered government."[62] Thus, when two or more rights conflict, they must be balanced, and that may in turn involve imposing justifiable limitations upon a right. Courts, then, must have a means, or a standard of assessing the justifiability of such limitations. Second, this balancing and determination of the justifiability of limitations involves a wider dialogue between the executive-legislative and the judicial branches of government, with neither having an absolute power entirely to negate the other's interpretation of fundamental rights.

1. Limitations

The first component, determining what limitations may be placed upon rights, is found in both international law and in other domestic legal systems. How is it that courts weigh, or balance, an infringement of a right against the government's claimed justification? It involves using a standard by which the limitation is assessed, and examples exist in international law, constitutional texts, legislation, and the judicial interpretation of all three. The *International Covenant on Civil and Political Rights*, for instance, provides that: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[63] The American Association for the International Commission of Jurists developed the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* expressly for the purpose of establishing "the conditions and grounds for per-

61. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

62. *Adelaide Co of Jehovah Witnesses Inc v Commonwealth* (1943) 67 C.L.R. 116, 132 (Austl.).

63. *ICCPR*, *supra* note 25, at art. 18(3).

missible limitations and derogations in order to achieve an effective implementation of the rule of law."[64] And the Canadian Charter of Rights and Freedoms provides that it: "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[65]

In American constitutional law, limitations emerge also through judicial construction of constitutionally enshrined fundamental freedoms. The U.S. Supreme Court has developed standards of constitutional review following the storied "footnote 4" in Justice Harlan Stone's opinion in *United States v. Carolene Products Company*.[66] The footnote reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . , or national . . . , or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[67]

From this single footnote has grown an entire body of law on the standards of review of Bill of Rights violations, the way in which the judiciary assesses justifiable limitations, and the balancing of rights against the collective interest. The Supreme Court has, over time, established a minimal level of review—found in the "rational basis test"—an intermediate standard, and a higher standard known as "strict scrutiny."[68]

The Australian approach to limitations and balancing is both legislative and judicial. In the Australian state of Victoria, the *Charter of Human*

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64. Permanent Representative of the Netherlands, *Status of the International Covenants on Human Rights*, ¶ ii, U.N. Doc. E/CN.4/1985/4, annex (1984).

65. Canadian Charter of Rights and Freedoms, *supra* note 14, at § 1.

66. United States v. Carolene Products Co., 304 U.S. 144, 152–53, n.4 (1938) (internal citations omitted); *see generally* Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982); Jack M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988).

67. *Carolene Products Co.*, *supra* note 66, 152–3, n.4 (internal citations omitted).

68. *See Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Korematsu v. United States*, 323 U.S. 214 (1944).

Rights and Responsibilities Act 2006 (Vic.) provides that: "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom." [69] The High Court, in applying the implied freedom of political communication, imposes a limitations test upon the ambit of the right, such that: "if the law effectively burdens th[e] freedom, is [it] . . . reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?"[70] It may even be the case that the High Court has established a similar limitations standard to the expressly enumerated rights found in the *Constitution*.[71]

These standards—well-established in international and Australian law—are an important recognition of the fact that no right is absolute. Rather, every human right must always be balanced against the interests of the wider community. There will be cases in which the individual interest cannot prevail as against the community interest, and others where it must. But the courts must have some means of assessing each such conflict. Limitations standards provide that approach. And Australia is familiar with this approach, both in the interpretation and application of the *Constitution*, as well as when applying human rights and anti-discrimination legislation. The recognition of circumstances in which rights may be justifiably limited, and the establishment of standards for determining when such limitations are justifiable allows for a robust "dialogue" between the executive-legislative and judicial branches of government.

2. Dialogue

The fact that courts tend to be the institutional body that both determines the ambit or scope of a human right, and determines its justifiable limitation tends to deflect attention from an important truth of human rights protection: all three branches of government share an equally legitimate role in the interpretation and imposition of limitations upon rights. No right is absolute, that is true, but all three branches of government share the responsibility of determining what that right is and when it may be limited. Peter Hogg and Allison Bushell, writing in relation to the Canadian Charter of Rights and Freedoms, first coined the phrase "dialogue" (or as some call it, "institutional

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69. *The Charter of Human Rights and Responsibilities Act 2006* (Vic.), § 7(2); *see Human Rights Act 2004* (ACT), Republication No. 12, § 28(2) (effective Mar. 2, 2017); *Human Rights Act 2019* (Qld), § 13 (2019).

70. *Lange v Australian Broad Corp* (1997) 189 CLR 520, 567. In Canada, where the text of the Canadian Charter of Rights and Freedoms and its judicial interpretation work together to establish the limitation standard, the Supreme Court of Canada very early in the history of the Charter added its interpretation of § 1 in *R. v. Oakes*; the "*Oakes* test" is now considered an axiomatic component of the Charter approach to rights protection. Canadian Charter of Rights and Freedoms, *supra* note 14; *R. v. Oakes*, [1986] 1 S.C.R. 103.

71. *See* Babie, *National Security and the Free Exercise Guarantee of Section 116, supra* note 41.

interaction") to describe the interrelationship between the three branches of government in respect of human rights protection.[72] Dialogue suggests a "conversation" between the three branches of government,[73] allowing the judiciary to comment upon the adequacy of legislation or the actions of the executive. The legislature can respond to such judicial comment by amending legislation or administrative practices. It may even go so far as to allow the possibility of explicit legislative rejection of the judicial outcome.[74]

In relation to human rights protection, whether constitutional or legislative, dialogue typically assumes one of two forms, or a combination of them. The first is known as "strong" dialogue.[75] The strength of dialogue depends on the extent to which the legislature may respond once the courts have spoken.[76] The best example of this is § 33 of the Canadian Charter of Rights and Freedoms, which constitutionally entrenches the power of the courts to invalidate legislation, but which also allows the legislature to re-enact such legislation "notwithstanding" the court's interpretation.[77] "Weak" dialogue, however, allows either the judiciary or the legislature-executive an unbalanced or asymmetric power to speak to the detriment of the opposite branch.[78] The former occurs in the United States, in which the judiciary holding the power to invalidate acts of the legislature for the infringement of enumerated rights, with the only legislative response being constitutional amendment.[79] This is true also of Australia in respect of both enumerated and implied rights. Strong dialogue occurs under the *Human Rights Act of 1998* (U.K.), the *New Zealand Bill of Rights Act 1990* (N.Z.), the *Human Rights Act 2004* (ACT), *The Charter of Human Rights and Responsibilities Act 2006* (Vic.), and the *Human Rights Act 2019* (Qld);[80] in each case, the judiciary plays a role in the enforcement of human rights short of invalidation of legislation.[81] This allows some institutional interaction, leaving the "final say" to the legislature. While the judiciary may express an opinion, the legislature determines whether that opinion matters.[82]

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72. Peter W. Hogg & Allison A. Bushell, *The* Charter *Dialogue Between Courts and Legislatures (or Perhaps the* Charter of Rights *Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L. J. 75 (1997); *see* Leighton McDonald, *Rights, 'Dialogue' and Democratic Objections to Judicial Review*, 32 FED. L. REV. 1, 3 (2004).

73. ANDREW BYRNES ET AL., BILLS OF RIGHTS IN AUSTRALIA: HISTORY, POLITICS AND LAW 51 (2009).

74. ACT BILL OF RTS. CONSULTATIVE COMM., TOWARDS AN ACT *HUMAN RIGHTS ACT*: REPORT OF THE ACT BILL OF RIGHTS CONSULTATIVE COMMITTEE 61–2 (2003) [hereinafter TOWARDS AN ACT BILL OF RTS.].

75. *See* Hogg & Bushell, *supra* note 72.

76. *See id.*

77. Peter W. Hogg et al., Charter *Dialogue Revisited—or "Much Ado About Metaphors,"* 45 OSGOODE HALL L. J. 1, 3 (2007).

78. *See* Hogg & Bushell, *supra* note 72.

79. Marbury v. Madison, 5 U.S. 137, 177 (1803).

80. BYRNES ET. AL., *supra* note 73, at 52–53 (citations omitted).

81. TOWARDS AN ACT BILL OF RTS., *supra* note 74, at 61.

82. *Id.* at 61–2.

The truth, though, is that all legislation in some way affects the distribution of power between the three branches of government—in that sense, dialogue is not new. And recognizing that is important in confronting arguments that judicial review under constitutional bills of rights or, indeed, under legislative human rights protections is in some way anti-democratic or anti-majoritarian.[83] Instead, dialogue, both strong and weak, has always occurred in all Australian jurisdictions between the legislature and the judiciary and, to a lesser extent, the executive. The recognition of dialogue as an inherent dimension of the institutional interrelationship of the three branches of government acts, along with limitations standards, as an additional brake or restraint on the ethos of rights failing to recognize the importance of the community interest relative to the individual's; it forms an important component of the interpretative approach that exists in respect of the ABoR.

III. CONTENT

With the interpretative principles of the ABoR in place, we can turn to the content of the rights which it encompasses. Unlike the United States, in which, while relying to a limited extent upon the admonitions of international law, establishes the protection of fundamental rights and freedoms through the provisions of the *Bill of Rights*,[84] in Australia the content of such protection is found in three principle sources: First, the texts of the Commonwealth, and at least one State *Constitution*; second, legislative human rights enactments and legislation establishing a broad equality right—both positive and negative in its operation, and applicable to governmental and non-governmental actors—in the form of anti-discrimination legislation; and third, judicially-crafted canons of statutory interpretation that protect defined common law rights against legislative predation. I briefly describe each in turn.

A. Constitution

While it is typically thought that the *Constitution* contains few rights protections, these rights do form a central part of the ABoR's content. The *Constitution Act 1934* (Tas.), too, may also provide some protection for FoRB. I consider the former in some detail, and the latter briefly.

1. Commonwealth

a. Express

While the Commonwealth Constitution lacks an entrenched bill of rights,[85] it nonetheless contains five guarantees: (i) the § 80 right to trial by jury on

83. *See* Hogg & Bushell, *supra* note 72.

84. *See* The Advocs. for Hum. Rts., *Human Rights & The U.S.*, www.theadvocatesforhumanrights.org/human_rights_and_the_united_states (last visited Sept. 30, 2019).

85. See PYKE, *supra* note 19 for a comprehensive account of the history and background to the Australian Constitution's treatment of human rights.

indictment for an offence against any law of the Commonwealth;[86] (ii) the use of § 92 to establish the freedom of trade, commerce and intercourse within the Commonwealth;[87] (iii) § 116's protections for FoRB;[88] (iv) the § 117 protection against discrimination on the basis of state residency;[89] and (v) the § 51(xxxi) protection against compulsory acquisition of property without just terms compensation.[90]

Today, these five rights are treated as limiting legislative and executive action by the federal government. In respect of § 116, for instance, the High Court has said that it "is not, in form, a constitutional guarantee of the rights of individuals; . . . [it] instead takes the form of express restriction upon the exercise of Commonwealth legislative power."[91] That may be true, but taken within the context of other important rights protections in both Commonwealth and State and Territory legislation, these protections serve as an important component of the overall structure of rights protection in the ABoR. Here, I consider only the operation of § 116, as representative of the way in which, while narrowly interpreted, these provisions nonetheless provide important human rights protection.

Section 116 contains four separate guarantees against Commonwealth encroachment: against the establishment of a state religion, prohibiting the imposition of religious observance, protection for free exercise, and against a religious test for holding a Commonwealth office. This much we know—establishing that one's beliefs constitute a religion triggers the operation of § 116.[92] Beyond that, very little judicial attention has been given to § 116. The second guarantee (religious observance) has never been judicially considered while, of the other three, establishment[93] and a religious test for a Commonwealth office[94] have been considered only once each. Scarcely greater attention has been given to the free exercise guarantee, with

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86. *Cheatle v The Queen* (1993) 177 CLR 541(Austl.); *Brown v The Queen* (1986) 160 CLR 171 (Austl.); *see also Cheng v The Queen* (2000) 203 CLR 287 (Austl.).

87. See PYKE, *supra* note 19 for the extensive judicial treatment of this guarantee.

88. *Church of the New Faith v Comm'r of Payroll Tax (Vic)* (1983) 154 CLR 120 (Austl.); *A-G (Vic)*; *Ex Rel Black v Commonwealth* (1981) 146 CLR 559 (Austl.); *Adelaide Co of Jehovah Witnesses Inc. v Commonwealth* (1943) 67 CLR 116 (Austl.); *Krygger v Williams* (1912) 15 CLR 366 (Austl.); *see Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.); *Grace Bible Church v Reedman* [1984] 36 SASR 376 (Austl.); *Harkianakis v Skalkos* [1999] 47 NSWLR 302 (Austl.).

89. *Leeth v Commonwealth* (1992) 174 CLR 455 (Austl.); *Street v Queensland Bar Ass'n* (1989) 168 CLR 461 (Austl.).

90. *Re DPP (Cth)* (1994) 179 CLR 270 (Austl.); *Burton v Honan* (1952) 86 CLR 169 (Austl.); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (Austl.); *see generally Minister of State for the Army v Dalziel* (1944) 68 CLR 261 (Austl.).

91. *Ex Rel Black* 146 CLR, at 605 (Stephen J.).

92. See *Church of the New Faith* 154 CLR, for the various tests expounded to define religion.

93. *Ex Rel Black* 146 CLR, at 582 (Barwick C.J.); *see id*. at 604 (Gibbs J.); *id*. at 612 (Mason J.); *id.* at 653 (Wilson J.).

94. *Williams v Commonwealth*, (2012) 248 CLR 156 (Austl.).

only three High Court decisions providing guidance: *Krygger v Williams*;[95] *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth*;[96] and *Kruger v Commonwealth*.[97] *Krygger* established that § 116 protects against:

> [P]rohibiting the practice of religion—the doing of acts which are done in the practise of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition.[98]

Scant attention, true, but one might also think of this another way: if the Commonwealth were to attempt to establish a defined state religion, to which observance must be given, and of which one must be a member in order to hold an office of the Commonwealth, § 116 would almost certainly operate so as to prohibit that attempt. Similarly, an attempt expressly to prohibit the practice of a particular religion would also fail to satisfy the prohibition of § 116.

Narrow—yes, but the express human rights protections found in the Constitution are protections, nonetheless. And the High Court has filled gaps left by the Framers, as we have seen, adding a range of implied guarantees.

b. Implied

As we have seen, the High Court has found four freedoms implied from the text of the Constitution: (i) freedom of political communication;[99] (ii) a right to vote;[100] and, (iii) possibly, procedural fairness or due process, but perhaps not extending so far as to ensure equality before the law.[101] I want to consider

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95. *Krygger v Williams* (1912) 15 CLR 366 (Austl.).

96. *Adelaide Co of Jehovah Witnesses Inc. v Commonwealth* (1943) 67 CLR 116 (Austl.).

97. *Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.).

98. *Krygger,* 15 CLR, at 369 (Griffith C.J.).

99. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (Austl.); *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (Austl.); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Co* (1997) 189 CLR 520; *APLA Ltd v Legal Servs Comm'r (NSW)* (2005) 224 CLR 322 (Austl.); *Hogan v Hinch* (2011) 243 CLR 506 (Austl.); *Unions NSW v State of New South Wales* [2013] HCA 58 (Austl.); *A-G (SA) v Co of the City of Adelaide* (2013) 249 CLR 1 (Austl.); *McCloy v New South Wales* (2015) 257 CLR 178 (Austl.); *Brown v Tasmania* [2017] HCA 43; *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (Austl.).

100. *A-G (Cth); Ex. rel. McKinlay v Commonwealth* (1975) 135 CLR 1 (Austl.); *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 (Austl.); *Roach v Electoral Comm'r* (2007) CLR 162 (Austl.); *Rowe v Electoral Comm'r* (2010) 243 CLR 1 (Austl.).

101. *See Kable v DPP (NSW)* (1996) 189 CLR 51 (Austl.); *Leeth v Commonwealth* (1992) 174 CLR 455 (Austl.); *see* WILLIAMS & HUME, *supra* note 59, at 375; *Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.); *see also* Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYD. L. REV. 29 (2005).

here only the implied freedom of political communication. *McCloy v New South Wales*[102] established the ambit of the implied freedom as:

> [A] qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may 'exercise a free and informed choice as electors.' It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.[103]

In respect of religion, in *Attorney-General (SA) v Corporation of the City of Adelaide*, the Court added that:

> [S]ome 'religious' speech may also be characterised as 'political' communication for the purposes of the freedom. . . . Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.[104]

The ambit of the implied freedom of political communication seemingly expands, then, so as to cover religious communication, whether the infringement is Commonwealth or State.[105]

The High Court also sets a three-question standard by which to test the justifiability of limitations upon the implied freedom:

> 1. Does the law effectively burden the freedom in its terms, operation or effect?
>
> If "no", then the law does not exceed the implied limitation and the enquiry as to validity ends.
>
> 2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing".
>
> The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible

102. *McCloy* 257 CLR (French C.J., Kiefel, Bell & Keane, JJ.).

103. *Id.* at 193–4 (footnotes and citations omitted).

104. *A-G (SA) v Co of the City of Adelaide* (2013) 249 CLR 1, 43–4 (Austl.) (French C.J.)*; see id.* at 73–4 (Crennan & Kiefel, JJ.).

105. In *Clubb v Edwards; Preston v Avery* [2019] HCA 11 (Austl.), the High Court at least implies that the freedom extends so far as to encompass religious speech.

> with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.
>
> If the answer to question 2 is "no", then the law exceeds the implied limitation and the enquiry as to validity ends.
>
> 3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as "proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.
>
> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test—these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
>
> *suitable*—as having a rational connection to the purpose of the provision;
>
> *necessary*—in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance*—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
>
> If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be "no" and the measure will exceed the implied limitation on legislative power.[106]

While the ambit of the right is broad, encompassing a wide range of speech as political speech, limitations may nonetheless justifiably be imposed upon that right. But that is not unusual; in fact, it is entirely consistent with the approach taken to rights protections the world over throughout the latter half of the 20th century.

2. State

It is a little-known fact that at least one State Constitution, the *Constitution Act 1934* (Tas.), contains an express protection in § 46:

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106. *McCloy* (2015) 257 CLR 178, 194–95 (French, C.J., Kiefel, Bell & Keane, JJ.) (footnotes and citations omitted). This has been affirmed in *Brown v Tasmania* [2017] HCA 43, 123–131 (Kiefel, C.J., Bell & Keane, JJ.); *id.* at 236 (Nettle, J.); *Comcare v Banerji* [2019] HCA 23, 164–66 (Edelman J.).

> (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
>
> (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.[107]

It is important to note that this provision, while significant as a possible protection, contains both an internal limitation standard, and moreover, is in fact a "unique addition[] . . . considered a 'historical puzzle.'"[108] Indeed, in *Corneloup v. Launceston City Council*, Justice Tracey wrote:

> s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified "guarantee" has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person's religion of choice: see *McGee v Attorney-General*—a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the "guarantee". In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.[109]

Still, as with the express provisions of the *Commonwealth Constitution*, this provides the possibility for a qualified guarantee, at least in Tasmania, for FoRB. As such, § 46 represents a part, however small, of the content of the rights found in the ABoR.

B. Legislation

Extensive Commonwealth and State and Territory human rights and anti-discrimination legislation provides an important category of protected rights, both negative, against government and private encroachments, as well as positive obligations imposed upon both government and non-government actors. It is possible, as the Supreme Court of Canada has suggested in respect of a near identical body of Canadian law, that these Australian regimes

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107. *Tasmanian Constitution Act 1934* (Tas.) s 46.

108. TASMANIAN CONST. L. REFORM PROJECT, THE CURRENT CONSTITUTION: CONSTITUTION ACT 1934, https://wikis.utas.edu.au/display/TCLRP/The+Current+Constitution#FootnoteMarker39-0 (last visited Sept. 30, 2019); *see* GERARD CARNEY, THE CONSTITUTIONAL SYSTEMS OF THE AUSTRALIAN STATES AND TERRITORIES 48–9 (2006); R.D. LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES 34 (1991); *see also* SAWER, *supra* note 43, at 171.

109. *Corneloup v Launceston City Council* [2016] FCA 974 (Austl.) (Tracey, J.) (internal citations omitted).

enjoy a "quasi-constitutional" status, conferring a degree of paramountcy over other legislation.[110] The Supreme Court of Canada wrote in *Winnipeg School Division No. 1 v. Craton* that:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.[111]

While there is no equivalent High Court authority applying this point to the Australian regimes, it is very likely that attempts at implied, if not express, repeal of the legislation already in force at the Commonwealth and State level would meet with strong opposition.[112] Seemingly, then, this gives it a similar quasi-constitutional status. The Australian legislation can be divided into two classes: statutory charter, or bills of human rights, and equality or anti-discrimination legislation. I consider each in turn.

1. Human Rights

Human rights legislation in the Australian Capital Territory, Victoria, and Queensland—the *Human Rights Act 2004* (ACT), *The Charter of Human Rights and Responsibilities Act 2006* (Vic.), and the *Human Rights Act 2019* (Qld)—protects a range of human rights and freedoms in those jurisdictions.[113] In relation to FoRB, for example, these statutory bills of rights contain protections for freedom of thought, conscience, religion and belief, and the rights of minorities to enjoy their own culture, religion and language.[114] In addition to these specific religious rights, the Acts cover the

110. *See* Bowal & Thul, *supra* note 15, at 3; Hucker, *supra* note 15, at 557; WALTER S. TARNOPOLSKY, DISCRIMINATION AND THE LAW 2–28 (William F. Pentney ed., rev'd. ed. 1993).

111. *Winnipeg School Div No. 1 v Craton* [1985] 2 SCR 150, 156 (Austl.) (McIntyre, J.).

112. *See generally* Simeon Beckett, *Interpreting Legislation Consistently with Human Rights*, 58 AIAL FORUM 43, 43 (2007).

113. *See* BYRNES ET AL., *supra* note 73, at 109–14, for the background to the enactment of *The Charter of Human Rights and Responsibilities Act 2006* (Vic.). *See generally* ALISTAIR POUND & KYLIE EVANS, AN ANNOTATED GUIDE TO THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES (2008); CAROLYN EVANS & SIMON EVANS, AUSTRALIAN BILLS OF RIGHTS: THE LAW OF THE VICTORIAN CHARTER AND ACT HUMAN RIGHTS ACT (2008); GREG TAYLOR, THE CONSTITUTION OF VICTORIA 51–2 (2006); AUSTRALIAN CHARTERS OF RIGHTS A DECADE ON (Matthew Groves and Colin Campbell eds., 2017).

114. *See*, *e.g.*, *Human Rights Act 2004* (ACT), Republication No. 12, §§ 14, 27 (effective Mar. 2, 2017).

right to equality before the law,[115] the right to life,[116] the right to privacy,[117] freedom of peaceful assembly and association,[118] freedom of expression, the right to take part in public life,[119] and the right to liberty and security of the person.[120]

The legislation , not unexpectedly, also contains two important limitations upon the scope of the rights protected: (i) "[o]nly individuals have human rights,"[121] and (ii) any protected "[h]uman rights may be subject only to reasonable limits set by . . . laws that can be demonstrably justified in a free and democratic society."[122] As such, any limitations placed upon enumerated rights must be proportionate to the objective sought to be achieved by the legislation; a list of factors assists in determining proportionality.[123]

While the use of the rights enumerated in these bills has been limited to date,[124] that does seem to be changing, with individuals beginning to make use of the protections they contain.[125] And, importantly, these enactments have had a significant impact on the development of human rights protection through their effect on policymaking and legislative processes, largely in the culture of government—operating in the pre-enactment scrutiny of proposed legislation[126] and, significantly, affecting the national debate[127] about bills of rights.

2. Equality and Anti-Discrimination

A broad equality right or protection against discrimination on prohibited grounds is found in Commonwealth and State and Territory legislation. I consider each in turn.

a. Commonwealth

The inconsistency clause of the *Commonwealth Constitution* ensures that those matters in respect of which the Parliament has legislated take paramountcy over any State legislation regarding the same matter.[128] As such,

115. *Id.* at § 8.
116. *Id.* at § 9.
117. *Id*. at § 12.
118. *Id.* at § 15.
119. *Id.* at § 16.
120. *Id.* at §18.
121. *Id.* at § 6.
122. *Id.* at § 28(1).
123. *Id.* at § 28(2); *see* BYRNES ET AL., *supra* note 73, at 82.
124. BYRNES ET AL., *supra* note 73, at 99.
125. *See*, *e.g.*, Lisa Martin, *Blair Cottrell Moves to Appeal Conviction Over Mock Beheading Video*, GUARDIAN (Jul. 10, 2019, 4:37 AM), https://www.theguardian.com/australia-news/2019/jul/10/blair-cottrell-moves-to-appeal-conviction-over-mock-beheading-video.
126. BYRNES ET. AL., *supra* note 73, at 86–98.
127. *Id.* at 106–07.
128. *See* Vince Morabito & Henriette Strain, *The Section 109 "Cover the Field" Test of Inconsistency: An Undesirable Legal Fiction*, 12 U. TAS. L. REV. 182, 185–86 (1993).

while this legislation is not a constitutional guarantee, such enactments operate to the benefit of all Australians wherever they may be,[129] giving such law a quasi-constitutional status. Commonwealth anti-discrimination legislation has this effect.

Known as "federal discrimination law,"[130] the Commonwealth anti-discrimination regime is a piecemeal series of political comprises[131] found in four key enactments prohibiting defined categories of discrimination:[132] the *Racial Discrimination Act 1975* (Cth) ("RDA"), *Sex Discrimination Act 1984* (Cth) ("SDA"), *Disability Discrimination Act 1992* (Cth) ("DDA"), and the *Age Discrimination Act 2004* (Cth) ("ADA").[133] The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("HREOC Act") establishes the Australian Human Rights Commission (the "AHRC")[134] which holds a number of significant functions concerning human rights, including research and education, examining existing and proposed legislation for consistency with such rights, reporting to Parliament on the need for laws or

129. For further detail on the operation of Commonwealth discrimination law, see AUSTL'N HUM. RTS. COMM'N., FEDERAL DISCRIMINATION LAW 4 (2016), available at https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016.

130. *See id*.

131. *Commission Plans to Reform Discrimination Law,* AUSTL'N HUM. RTS. COMM'N (Aug. 1, 2019), https://www.humanrights.gov.au/about/news/commission-plans-reform-discrimination-law. In August 2019, the Australian Human Rights Commission launched a review of federal discrimination law. See AUSTL'N HUM. RTS. COMM'N, FREE AND EQUAL: AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS 8 (2019).

132. For a comprehensive treatment of the history and operation of Australian equality/anti-discrimination regimes, see FEDERAL DISCRIMINATION LAW, *supra* note 129 and NEIL REES ET. AL., AUSTRALIAN ANTI-DISCRIMINATION & EQUAL OPPORTUNITY LAW 893 (3rd ed. 2018).

133. To this list could be added a fifth, the *Fair Work Act 2009* (Cth) ("FWA") which, while containing key rights in respect of workplace discrimination, does not fall within the jurisdiction of the Australian Human Rights Commission; rather, the Fair Work Commission has responsibility for discrimination pursuant to this regime. On discrimination pursuant to this legislation, see REES ET. AL., *supra* note 132. The ongoing Israel Folau saga demonstrates the application of the FWA in the case of employment discrimination on the basis of religious beliefs. *See* David Mark, *Israel Folau's Case is Heading to the Courts—So What Happens Now?*, ABC NEWS (July 20, 2019, 7:17 PM) https://www.abc.net.au/news/2019-07-20/why-the-israel-folau-case-is-relevant-to-you/11282386. And on December 10, 2019, the Commonwealth government released a second exposure draft of a possible sixth piece of anti-discrimination legislation, motivated by the legislative acceptance of same-sex marriage, and incidents like the Folau saga. *See Religious Discrimination Bill 2019* (Cth), *Religious Discrimination (Consequential Amendments) Bill 2019* (Cth), and *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth) (collectively, 'Religious Freedom Bills'); *see also Religious Freedom Bills—Second Exposure Drafts*, AUSTL'N GOV., ATTORNEY-GENERAL'S DEPARTMENT, https://www.ag.gov.au/Consultations/Pages/religiousfreedom-bills-second-exposure-drafts.aspx (last visited Jan 3, 2020).

134. *The Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), sch 3, part 1, (2009). The *Human Rights and Equal Opportunity Commission Act 1986* (Cth), by renaming it the *Australian Human Rights Commission Act 1986* (Cth), and renaming the Commission the Australian Human Rights Commission.

other actions to implement international obligations, and examining Acts or practices of Commonwealth authorities for consistency with protected rights.[135]

The *HREOC Act* establishes the regime for making complaints of unlawful discrimination under the four primary Commonwealth anti-discrimination regimes. "Unlawful discrimination" is defined by § 3 as "any acts, omissions or practices that are unlawful under" one of the RDA, SDA, DDA, or the ADA.[136] The particular grounds of unlawful discrimination can be summarized as:

- race, colour, descent or national or ethnic origin;
- sex;
- sexual orientation;
- gender identity;
- intersex status;
- marital or relationship status;
- pregnancy or potential pregnancy;
- breastfeeding;
- family responsibilities;
- disability;
- people with disabilities who have a carer, assistant, assistance animal or disability aid; and
- age.[137]

While applicable to all Australians, federal discrimination law, due to a lack of Commonwealth legislative competence, fails to protect against some classes of discrimination. What the Commonwealth regime gains in national application, it lacks in comprehensiveness. The States and Territories, on the other hand, have legislated comprehensively in respect of discrimination, but can enforce claims only with respect to those acts which occur within the relevant jurisdiction.

b. State and Territory

All Australian jurisdictions have enacted legislation prohibiting discrimination,[138] with prohibited grounds including,[139]

- age;

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135. *Human Rights Commission Act 1986* (Cth), part II, div 2, § 11(e) (Amended 2017).

136. *Human Rights and Equal Opportunity Commission Act 1986* (Cth), part I, § 3 (2005).

137. FEDERAL DISCRIMINATION LAW, *supra* note 129, at 3.

138. *See Anti-Discrimination Act 1977* (NSW), (1977); *Equal Opportunity Act 1984* (SA), (1984); *Equal Opportunity Act 1984* (WA) (1984); *Discrimination Act 1991* (ACT), Republication No. 47, (effective 2019); *Anti-Discrimination Act 1991* (Qld), (1991); *Anti-Discrimination Act 1996* (NT), (1996); *Anti-Discrimination Act* 1998 (Tas.,), (1998); *Equal Opportunity Act 2010* (Vic.) (2010).

139. This list, representative of State and Territory regimes, comes from the *Equal Opportunity Act 2010* (Vic.), part 2, § 6, (2010).

- breastfeeding;
- employment activity;
- gender identity;
- disability;
- industrial activity;
- lawful sexual activity;
- marital status;
- parental status or status as a carer;
- physical features;
- political belief or activity;
- pregnancy;
- race;
- religious belief or activity;
- sex;
- sexual orientation;
- an expunged homosexual conviction;
- personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Thus, using FoRB as a representative example, while State and Territory regimes prohibit discrimination on the basis of religion[140] and a lack of religious belief,[141] these prohibitions provide only one dimension of the totality of the protection afforded religious freedom. Equally significant protection comes in the form of specific exemptions from the equality principle carved out for the benefit of religious organizations.[142] These exemptions, carefully

140. *See*, *e.g.*, *Equal Opportunity Act 2010* (Vic.), part 2, § 6(n), (2010). In Victoria, discrimination on the basis of a characteristic of a person's religion is also prohibited. *Id*. at part 2, § 7(2)(b), (c); *Kapoor v Monash Univ* [2001] 4 VR 483 (Austl.).

141. *See*, *e.g.*, *Equal Opportunity Act 2010* (Vic.), part 1, § 4(1), (2010).

142. *See*, *e.g.*, *Anti-Discrimination Act 1977* (NSW), § 56, (1977); *Sex Discrimination Act 1984* (Cth), §§ 37, 38, (1984); *Equal Opportunity Act 1984* (SA), §§ 50, 85ZM, (1984); *Equal Opportunity Act 1984* (WA), part IV, div. 4, § 66(1), part VI, §§ 72, 73, (1984); *Discrimination Act 1991* (ACT), part 4, div. 4.1, §§ 32, 33, part 4, div. 4.4, § 46, (1991); *Anti-Discrimination Act 1991* (Qld), part 4, div. 3, sub-div. 2, § 41(a), part 4, div. 8, sub-div. 2, § 90, part 5, § 109 (1991); *Anti-Discrimination Act 1996* (NT), part 4, div. 5, § 43, part 5, div. 1, § 51 (1996); *Anti-Discrimination Act* 1998 (Tas), part 5, div. 8, §§ 51, 52 (1998); *Equal Opportunity Act 2010* (Vic), part 5, §§ 81, 82, 83, 84 (2010).

proscribed by the legislation, operate to the benefit of religious orders, bodies, or institutions generally,[143] as well as for religious and non-religious educational institutions more specifically, allowing for discrimination on prohibited grounds if required for the religious purposes of the organization.[144]

C. Judicial

The common law does not contain express recognition of rights.[145] Principles of statutory interpretation, however, provide some limited protection through the "common law bill of rights" and the principle of "legality."[146] These judicially-created canons—a "quasi-constitutional" common law bill of rights—establish a set of standards by which legislation purporting to override a specific right must be assessed.[147] Thus, to override a specific right, such as religious freedom, a statute must either do so in clear and unambiguous terms,[148] or where legislation is ambiguous, a construction most in conformity with Australia's treaty obligations concerning the right in question ought to be favored.[149] It is arguable that these common law methods of statutory interpretation have become part of the judicial approach to the *Commonwealth Constitution's* express protections of rights, including that found in § 116.

Of course, because legislation is so easily modified by a contrary statutory intention, the protections provided by this common law bill of rights is

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143. *Anti-Discrimination Act 1977* (NSW), § 56(a)–(d) (1977); *Equal Opportunity Act 2010* (Vic), part 5, § 82 (2010); *Fair Work Act 2009* (Cth), §§ 153(2)(c), 195(2)(c), ch. 3, div. 5, §§ 351 (2)(c), 772(2)(c) (2009); *Sex Discrimination Act 1984* (Cth), part II, div. 4, § 37(a), (b), (d) (1984).

144. *Anti-Discrimination Act 1977* (NSW), part 3, div. 3, § 31A, 31K, part 4, div. 2, § 46A, part 4c, div. 3, § 49ZO, (1977); *Equal Opportunity Act 2010* (Vic), part 4, div. 3, § 39, part 5, § 83 (2010); *Sex Discrimination Act 1984* (Cth), part II, div. 4, § 38 (1984).

145. *Grace Bible Church v Reedman* [1984] 36 SASR 376 (Austl.); *see* Dan Meagher, *The Judicial Evolution (or Counter-Revolution) of Fundamental Rights Protection in Australia*, 42 ALT. L. J. 9 (2017); Dan Meagher, *One of My Favourite Law Review Articles: Paul Finn's, 'Statutes and the Common Law' (1992) 22 University of Western Australia Law Review 7*, 35 QLD. U. L. J. 135 (2016); Dan Meagher, *The Common Law Principle of Legality*, 38 ALT. L. J. 209 (2013).

146. James Spigelman, Chief Justice of New South Wales, The Common Law Bill of Rights, 2008 McPherson Lectures: Statutory Interpretation & Human Rights (Mar. 10, 2008); Meagher, *The Judicial Evolution*, *supra* note 145; Meagher, *One of My Favourite Law Review Articles*, *supra* note 145; Meagher, *The Common Law Principle of Legality*, *supra* note 145.

147. *See Grace Bible Church v Reedman* [1984] 36 SASR 376 (Austl.); Meagher, *The Judicial Evolution, supra* note 145, at 9; Meagher, *One of My Favourite Law Review Articles, supra* note 145, at 135; Meagher, *The Common Law Principle of Legality, supra* note 145, at 209; Spigelman, *supra* note 146.

148. *Church of the New Faith v Comm'r for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Austl.); *Re Bolton; Ex Parte Douglas Beane* (1987) 162 CLR 514, 523 (Austl.); *Canterbury Mun Council v Moslem Alawy Soc'y Ltd* [1985] 1 NSWLR 525, 544 (Austl.).

149. *Minister for Immigr and Ethnics Aff v Teoh* (1995) 183 CLR 273, 287 (Austl.).

far from a robust bulwark against legislative encroachments.[150] Still, as a technique of interpretation, it demonstrates judicial willingness to consider legislation through the ethos of rights found in other sources considered earlier. Taken together, these judicial additions to human rights protection in Australia forms a small, but important component of the ABoR.

IV. REMEDIES

Rights are meaningless without remedies. This is well-established in American Constitutional law, with a wide panoply of remedies available for the violation of rights protected by the *Bill of Rights*.[151] In the case of the ABoR, a dual question arises: to what or whom does the ABoR apply, and what remedies are available to redress violations of the human rights which it protects?[152] The answer to the first part of this question lies in the very significant, but frequently overlooked advantage over purely constitutional rights protections in Australia's protection of human rights through a convergence of multiple sources: it allows for a vastly expanded range of actors and entities subject to remedial redress. Bowal and Thul, writing about the convergence of the constitutional and legislative sources of human rights protection in Canada, put it this way:

> A Human Rights Act, by contrast [to the Charter of Rights and Freedoms], generally confers the one major right of equality (or non-discrimination) and extends this particular right completely through to the private sector. This is the most recent and controversial extension of human rights. Therefore, residential landlords, employers, professions and businesses generally must grant equality to all those individuals who would do business with them. Private parties such as businesses have no ability to ensure one has the right to vote in elections and they even cannot guarantee free speech, so their sole legal obligation in human rights is to treat their tenants, employees or customers (as the case may be) with equality. This is monitored by reference to specific 'prohibited grounds of discrimination' such as religion, gender, race, disability, etc.[153]

Thus, a convergence of remedial sources allows the application of rights protections, and remedies for their violation, against both governmental and non-governmental actors and entities. This is an advantage of, not a drawback to the Canadian system. No less is true of the ABoR I propose here—

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150. *Aboriginal Legal Rts Movement Inc v South Australia [No. 1]* [1995] 64 SASR 551, 552 (Austl.) (Doyle, C.J., with whom Bollen, J. agreed); *id.* at 554 (Debelle, J.).

151. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

152. *See* John von Doussa, *Why we Need an Australian Bill of Rights—a Joint Forum* (Dec. 7, 2005), https://www.humanrights.gov.au/about/news/speeches/why-we-need-australian-bill-rights-joint-forum.

153. Bowal & Thul, *supra* note 15.

a convergence of Australian sources: constitutional, legislative, judicial, Commonwealth, State, and Territory.

The answer to the second part of the question—the remedies available against those actors and entities which may violate fundamental rights—can be divided into three parts: constitutional remedies, statutory remedies, and judicial remedies. I briefly consider each in turn.

A. Constitutional

Obviously, any of the constitutional rights, either express or implied, have as their ultimate remedy a declaration of invalidity: "the 'law' is treated as being void *ab initio*, as never having been a law at all."[154] A law may be declared invalid in its entirety or one or more of its sections may be "severed" due to invalidity, or it may be interpreted narrowly ("read down") so as to be valid.[155] Importantly, though, this remedy is enforceable only as against the Commonwealth government and governmental actors.

When challenging a decision made by a Commonwealth tribunal or executive officer on the ground that the law authorizing the act was invalid, a successful party may seek a writ of prohibition or one of the supervisory writs (once known as the prerogative writs). These writs, if granted, result in a tribunal or officer being told to stop proceeding with the matter: *certiorari* quashes a tribunal's decision; *mandamus* results in a tribunal being told to proceed with the matter under the valid parts of the law, properly interpreted.[156]

Constitutional remedies are available only against the Commonwealth government or governmental actors, either in the form of legislation in the case of the former, or executive action in the case of the latter. The potential scope of remedies, and the actors against whom they might apply, as already suggested, is significantly expanded by virtue of the fact that much of the ABoR is legislative.

B. Legislative

Legislative remedies depend upon whether the right in question is found in a legislated human rights or anti-discrimination regime.

1. Human Rights

While the human rights acts in the ACT, Victoria, and Queensland preserve parliamentary sovereignty by leaving ultimate decisions concerning the violation of human rights to the parliament (thus establishing a form of

154. PYKE, *supra* note 19, at 92 [7.6].
155. *Id.* at 92 [7.6], 104-8 [8.60]–[8.70].
156. *Id.* at 92 [7.6].

"weak" dialogue), there nonetheless exists at least five enforcement mechanisms:[157] (i) an obligation on decision-makers to interpret laws (excluding the common law) to be consistent so far as possible with human rights;[158] (ii) judicial jurisdiction to issue declarations of incompatibility in cases where legislation cannot be interpreted so as to be consistent;[159] (iii) a duty on the Attorney General to present written statements on the compatibility of each government bill presented to the parliament;[160] (iv) an office of Human Rights Commissioner, with power to review laws for compatibility with the human rights legislation;[161] and (v) possible override of legislation for a limited term.[162]

2. Equality and Anti-Discrimination

A wide range of possible remedies exist in respect of anti-discrimination legislation, both Commonwealth and State or Territory, which can be awarded or granted either by a court or a tribunal, and may be issued against both governmental and non-governmental entities and actors, including any person, whether natural or legal.[163] This significantly expands the scope of remedial protection available to a party claiming a violation of a fundamental right, well beyond what is available even in those systems with constitutionally-entrenched comprehensive bills of rights.

In general, the State and Territory legislation provides for three categories of remedy "(1) findings of a declaratory nature that unlawful discrimination has occurred; (2) compensatory damages; and (3) injunctive-style orders which compel or prohibit conduct by the respondent."[164]

In addition to these remedies, however, the Commonwealth federal discrimination law—the RDA, SDA, DDA, and the ADA—provides for a very broad power in the Federal Court to "make such orders as it thinks fit."[165] This power, not yet judicially tested,[166] plays the role in the Commonwealth

157. For the history and legislative background to the *Human Rights Act 2004* (ACT), see BYRNES ET. AL., *supra* note 73, at 74–80.

158. *See*, *e.g.*, *Human Rights Act 2004* (ACT), part 4, § 30 (2004); *see* BYRNES ET. AL., *supra* note 73, at 83–5, for a detailed discussion of the operation of this provision.

159. *See*, *e.g.*, *Human Rights Act 2004* (ACT), part 4, §§ 32, 33, part 5, § 39 (2004).

160. *See*, *id.* at part 5, § 37.

161. *See*, *id.* at part 6, § 41; *see also id.* at part 5, §§ 38, sch 2.

162. *See*, *id.* at part 4, § 31. On these grounds, *see* BYRNES ET. AL., *supra* note 73, at 123.

163. *See*, *e.g.*, *Equal Opportunity Act 2010* (Vic), part 1, §§ 4(1), 5 (2010).

164. REES ET AL., *supra* note 132, at 894.

165. *Australian Human Rights Commission Act 1986* (Cth), part II, div. 5, § 46PO(4) (1986).

166. REES ET AL., *supra* note 132, at 894. For further detail on the operation of remedies in Commonwealth federal discrimination law, see AUSTL'N HUM. RTS. COMM'N, *supra* note 131, at 367–430.

regime of the exhaustive list of remedies found in the State and Territory legislation.[167]

C. Judicial

Of course, the first two types of remedies are granted by courts, so in a sense all three categories are "judicial" remedies. By judicial remedies, I mean those which follow an application of the common law bill of rights or the principle of legality. Legislation which fails to satisfy these common law standards may not be applied by a court. This may seem a limited remedy and, given the potential for legislative override, indeed it is. Yet, when taken together with constitutional and legislative remedies, it bolsters the already ample array of remedial approaches open to the Australian judiciary to redress rights violations.

V. CONCLUSION

The ABoR I propose in this Article is far from perfect, it is certainly not comprehensive, and it is of course not constitutionally entrenched. It is nothing like what one finds in those nations that protect fundamental human rights through their constitutions, such as the United States or Canada, or those that legislatively protect such rights, such as the United Kingdom or New Zealand. Instead, Australia achieves rights protection by bringing-together a convergence of a disparate group of human-rights protecting sources; but it all depends on one's perspective. If it is viewed as just that much—a bunch of unconnected, unrelated pieces—then it is the flawed, piecemeal protection which I have long called it. But if viewed *creatively* and *innovatively*, in the spirit of Sutton and Dicey, one might just see a bill of rights.

I want to provide a very brief summary of what my constructed ABoR contains. It consists of four central components:

1. If judges use the rights ethos found in international human rights protections and in Australian law, then:
2. The rights contained in the ABoR can include:
   (1) Constitutional Rights, express and implied, contained in the *Commonwealth* (and perhaps the *Tasmanian*) *Constitution*, enforceable against Commonwealth governmental actors and entities (or against Tasmanian governmental actors and entities in respect of the *Tasmanian Constitution*);
   (2) Broad Statutory Rights, contained in ACT, Victorian, and Queensland human rights legislation, enforceable against governmental actors and entities;

167. REES ET AL., *supra* note 132, at 894; *See* 892–951; *see*, *e.g.*, *Equal Opportunity Act 2010* (Vic), part 8, div. 2, § 125 (2010).

(3) A Broad Statutory Equality Right or Anti-Discrimination Prohibition, contained in Commonwealth and in all State and Territory anti-discrimination legislation; and
(4) Judicially Created Common Law Bill of Rights and a Principle of Legality, for use in interpreting legislation consistently with the ethos of rights.

3. Most of the rights contained in 2 already have internal limitations standards, either constitutionally, legislatively, or judicially established. Where such standards have not been established, it is clear that it is open to the courts to do so—even in the case of express Constitutional rights[168]—as they have already done, extensively so, in the case of the implied freedom of political communication.
4. The interplay of the rights in 2 and the limitations standards in 3 establish a dialogue—whether it is strong or weak depends upon the right in question—concerning the protection of human rights in Australia, as between the executive-legislative and the judicial branches of government.

I conclude with two final thoughts. First, you may disagree with me. What I propose is clearly unusual. Perhaps suggesting that there is any way rationally to combine the disparate elements I combine here is misguided. My answer? In the absence of anything else, any concerns we might harbor with respect to human rights violations go unheeded. There seems little political will to change the status quo, so we might as well see what we have as something worthwhile and useful, rather than reject it as weak and ineffectual. When we combine the elements creatively and innovatively, perhaps it might not seem so bad. It might even be an ABoR. Perhaps.

That leads me to my final thought. What I have done here is not meant as a substitute for what Australia really needs: a constitutionally-entrenched and comprehensive bill of rights that protects all Australians. That must be our goal. But until we reach it, the ABoR I propose here acts as a very useful, and uniquely Australian, placeholder.

168. *See* Babie, *National Security and the Free Exercise Guarantee of Section 116*, *supra* note 41.