

## THE NORMATIVITY OF THE PRINCIPLE OF LEGALITY

BRENDAN LIM\*

*The constitutional justification for the principle of legality has been transformed. Its original basis in a positive claim about authentic legislative intention has been repudiated. Statutes today are so far-reaching that it would be wrong to suppose any actual improbability in legislative intentions to abrogate common law rights. Two rival justifications for the principle have emerged in response. One is a refined positive claim: legislatures do not intend to abrogate 'fundamental' rights. The other is a normative claim: courts should attribute an intention not to abrogate rights in order to improve the political process. Distinguishing these justifications answers the vexed question of which rights engage the principle of legality. 'Fundamental' rights, in the first claim, just are those rights that legislatures do not, in fact, intend to abrogate. The normativity of the second claim is engaged not by 'fundamental' rights, but by 'vulnerable' rights not adequately protected by the ordinary political process. 'Vulnerable' rights may originate not only in the common law but also in statutes.*

CONTENTS