European Master in Law and Economics

Fundamental Rights and Counter-Terrorism in the Absence of a Bill of Rights: The Australian Case

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Author’s Declaration

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from Dr. Peter Lewisch.

This thesis is not used as part of any other examination and has not yet been published.

[Signature]
16.08.2015
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1. Introduction

1.1 Background

It is a truth universally acknowledged, that a society in possession of a powerful ruler must be in want of rules which safeguard fundamental rights.\(^1\) Thus the stage is set to consider how this applies to Australia’s expansion of counter-terrorism powers.

Historically, Australia has been at low risk of domestic terrorism, the most notable tragedies being the 1978 bombing of the Commonwealth Heads of Government Meeting in Sydney’s Hilton Hotel and the 2014 hostage siege in the Lindt Café, Martin Place, Sydney.\(^2\) However, post-September 11, Australia has enacted over sixty pieces of counter-terrorism legislation, including expanding intelligence and law enforcement powers. This “hyper-legislative” response has outpaced the number of laws in the United Kingdom (UK), United States (US) and Canada.\(^3\) The proliferation of what many dub as “draconian” measures is increasingly being perceived as ordinary, rather than exceptional.\(^4\) There is a danger to that. Such measures establish new standards, expectations and norms about the state’s role in protecting rights, and increase the potential for executive overreach.\(^5\) At the outset, it appears that Australia’s institutional rule design does not prioritise the protection of rights. It may even be that certain rights are more disproportionally affected than others; however, this will be explored later.

What constitutes better rule design? KANT argues, when designing rules for government, one should assume that “all men are knaves”.\(^6\) It is far wiser to err on the

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\(^1\) An adaptation of Jane AUSTEN’s iconic opening line from *Pride and Prejudice*.


\(^3\) ROACH, 2011, p.309; Further, in 2014, Australia had the lowest global terrorism-impact ranking from these four countries - UK: 27; US: 30; Canada: 84; Australia: 95. See GLOBAL TERRORISM INDEX 2014, which measures direct, indirect, economic and non-economic impacts of terrorism.

\(^4\) WILLIAMS, 2011, p.1139.

\(^5\) Ibid.

side of caution and design rules which constrain dictators from doing harm, as
benevolent leaders already have incentives to achieve the socially desired outcome. 
How can we impose rules for rulers? According to HOBSES, constitutions are social
contracts which prevent arbitrary state action. Many constitutions codify fundamental
rights through a Bill of Rights, which mirrors the people’s will and ensures state respect
for rights.

In contrast to its “Western” counterparts, Australia stands alone as it does not have a
federal Bill of Rights. Rather, its protection of rights is decentralized, enshrined in the
Constitution, common law and statute. This institutional design has been criticised as
problematic, as there are more gaps in the social contract and less constraints on rulers,
allowing them to pass “harsh” counter-terrorism measures, to the detriment of rights.
The thesis aims to answer the question: would an Australian Bill of Rights produce
incentive constraints for regulators to act within their scope of power in the counter-
terrorism context?

This paper proceeds on two bases from a Public Choice perspective. Positive analysis of
Law and Economics is employed in considering what implications may arise for rights
in the counter-terrorism context given the absence of a Bill of Rights. Normative
analysis identifies how Australia’s rule design should be, vis-à-vis Bills of Rights acting
as adequate incentive constraints. This will be achieved through comparative analysis of
Australia and the UK’s institutional frameworks, with a focus on metadata retention
laws and pre-charge detention mechanisms.

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7 VOIGT, 1999, p.531.
1.2 Aims and Intuition

At its broadest level, this paper employs Law and Economics to consider how a good set of rules should be designed. In their essay, *The Reason of Rules*, Geoffrey BRENNAN and James BUCHANAN opine that rules shape outcomes, and some outcomes are better than others. A poorly designed set of rules can have adverse social consequences. If this is so, “what rules – and what institutions – should we be struggling to preserve?”

What is the intuition behind this approach? BRENNAN and BUCHANAN argue that political processes can be viewed through the same lens as markets: a system of exchange between individuals whereby certain outcomes emerge as equilibria within different institutional rules. Political actors make decisions to maximise their utility, given options available to them under the constraints of rules. The problem arises when these actors, acting as agents, make decisions detrimental to individuals, the principal. This is all too common in the counter-terrorism context, where agents attempt to maximise private interests, by producing “harsher” counter-terrorism to the detriment of rights.

Is this perspective echoed by civil libertarians unfounded, or is there cause for concern? If political actors’ objectives are given, and their interactions under a set of rules produces an equilibrium outcome, it follows that particular rules may not be functioning as they should. In the words of Gordon TULLOCK’s *The Social Dilemma*, it may well be that insufficient constraints exist to reconcile decisions of privately motivated actors

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8 BRENNAN and BUCHANAN, 1985, p.2.
9 Ibid, p.15.
10 Ibid.
11 Ibid.
12 TULLOCK, 1974.
in the interest of fundamental rights. If this holds, then the desired outcome would be to modify rules so sufficient constraints exist.

How can we conduct a reality check to test Australian waters? The Law and Economics toolbox is well-equipped to explore such ideas. Through comparative institutional analysis, we take what is missing in Australia’s institutional design and determine whether that would achieve the desired outcome of protecting rights. Compared to its democratic counterparts, what is missing is the basic bedrock for the protection of rights: the Bill of Rights. If Australia has survived without it, is its current institutional framework adequate, or could a Bill of Rights achieve the socially desired outcome? Are we in need of a Bill of Rights perhaps now, as terrorism causes an uprise in human-rights-sensitive legislative action? Re-characterising complex legal problems into economic solutions through Public Choice, it is hoped that this study will demonstrate the usefulness of Law and Economics in predicting behaviour through constitutional rule design, and providing insights to policymakers.

1.3 Definitions

Now that the aims and intuitions have been articulated, this section defines key terms:

- **Regulators** - Executive state branch, namely, bureaucratic Heads of enforcement branches (ie, Ministers);

- **Fundamental rights** - a dichotomy of human rights (including liberties), divided into two categories. *Physical integrity rights* include the rights not to be tortured, extra-judicially killed, disappeared, or imprisoned for political beliefs.¹³ *Civil rights* include the rights to free speech, freedom of association

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and assembly, freedom of religion, freedom of movement, and freedom to participate in free and fair elections;\textsuperscript{14}

- **Bill of Rights** – a legal instrument produced by the state which guarantees fundamental rights.\textsuperscript{15} It can either be a constitutionally entrenched instrument (eg, US and Canada), or a statutory model, (eg, UK and New Zealand). The former has binding force on legislators, whilst the latter does not;\textsuperscript{16}

- **Counter-terrorism** – the sets of laws, policies and strategies for the prevention, deterrence, pre-emption and direct response to combatting terrorism.\textsuperscript{17} These measures can derive from a military model, such as increased policing strategies and intelligence operations, or a criminal justice model, such as de-radicalisation measures and freezing terrorist funds.\textsuperscript{18}

It is now useful to reframe these terms within the Public Choice lexicon. This paper brings the contractarian approach to the fore, so the entire political process is based on multiple-person exchanges.\textsuperscript{19} As such, “rules of the game”, including what rights should exist, derive from agreement between members of society.\textsuperscript{20} This theory of constitutional rights assumes that rights are agreed under a “veil of ignorance”, as uncertainty exists about players’ future positions.\textsuperscript{21} The state guards those rights, and any attempt to circumvent them constitutes a contractual breach.\textsuperscript{22} Here the Constitution, as a social contract, is born; it legitimises state action by producing a measurable yardstick for agents to act within their scope of power. A Bill of Rights, inserted into the Constitution, thus acts as a contractual supplement.

\textsuperscript{14} Ibid; noting this list is non-exhaustive for our purposes (eg, privacy is also a civil right).
\textsuperscript{15} WEBBER, 2011, p.5.
\textsuperscript{16} CHESTERMAN and GALLIGAN, 2009, p.30.
\textsuperscript{17} RINEHEART, 2010.
\textsuperscript{19} BRENAN and BUCHANAN, 1985, p.25; BUCHANAN and TULLOCK, 1962.
\textsuperscript{20} BRENAN and BUCHANAN, 1985, p.25.
\textsuperscript{21} MUELLER, 1996, ch.14.
\textsuperscript{22} BRENAN and BUCHANAN, 1985, p.26.
Moving on, counter-terrorism, as part of “inner security” in general, can be thought of as a public good because it is non-rival and non-excludable in nature, supplied to the nation as a whole.\(^{23}\) Whilst public and private actors can deliver the good, it is the state which legitimises these measures through legislation.

In this light, could a Bill of Rights be the perfect rule for Australia’s institutional design? Could it incentivise regulators to balance their discretionary scales more proportionately? Before embarking on this analysis, we consider the scope and assumptions for this paper.

1.4 Scope and Assumptions

The scope of this paper is federal in focus. It considers national Bills of Rights, comparing Australia to the UK.\(^{24}\) It also concentrates on specific counter-terrorism measures, namely, metadata retention and pre-charge detention of suspects.

This paper proceeds with assumptions.

First, the Law and Economics framework employs the *homo economicus* model, as our question focuses on how a Bill of Rights might expect a rational policymaker to behave.\(^{25}\) This neoclassical model is the most appropriate one for constitutional analysis, as the efficiency norm is central to its view, alongside the idea that individuals maximise utility. Disposing of the “benevolent leader”, this viewpoint captures conflict amongst actors, and affirms why political agents should have less discretionary power.\(^{26}\)

\(^{24}\) It is beyond the scope of this paper to consider local Bills of Rights. Local variances produce undesired effects such as “jurisdiction shopping” which would affect our examination of regulators’ overall behaviour.\(^{25}\) Kirchgassner, 2013.
\(^{26}\) Brennan and Buchanan, 1985, p.54; This may endorse an implicit assumption that judges are the best protectors of rights. Whilst judges are also utility-maximisers, constitutional constraints (independence) attempts to remove day-to-day “temptations”. See Epstein, 1990, p.831–832.
Second, this paper applies Public Choice, which discards the Keynesian assumption that governments can always correct market failures. Rather, this “politics without romance” approach assumes governments can also be the source of failure.

Third, it is assumed that a trade-off exists between counter-terrorism and rights (Figure 1). KAPLOW and SHAVELL (2002) stipulate that rights are not absolute; individuals are willing to trade-off some rights for the preservation of other goals. Thus, increased counter-terrorism measures relate to reduced rights based on a legislated, rather than absolute, level.

![Counter-terrorism / Rights trade-off](image)

*Figure 1: Counter-terrorism/Rights Trade-off*

The counter-terrorism/rights trade-off is a strong assumption, as both concepts may be reconcilable. However, this paper limits application to cases involving trade-offs, treating them as dominant. This can be evinced from Table 1, which demonstrates four options for producing counter-terrorism/rights. When one option is maximised, the other is compromised, which occurs in half the cases. The “political ideal” occurs when both goals co-exist (no trade-off). “Political non-consideration” occurs when neither

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27 SHAW, 2002.
28 BUCHANAN, 1999, p.46.
30 For example, “smart” counter-terrorism strategies, such as emergency preparedness measures, do not violate rights. Likewise, “harsh” policies, such as torture, are counter-productive for security. See ROACH, 2009, p.2152;2159.
goals are fulfilled (both traded-off). This leaves three options, from which the dominant case (two) represent trade-offs.31

<table>
<thead>
<tr>
<th>COUNTER- TERRORISM</th>
<th>Fails to achieve policy goal</th>
<th>Achieves policy goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fails to achieve policy goal</td>
<td>No trade-off (political non-consideration)</td>
<td>TRADE-OFF</td>
</tr>
<tr>
<td>Achieves policy goal</td>
<td>TRADE-OFF</td>
<td>Co-existence (political ‘ideal’)</td>
</tr>
</tbody>
</table>

*Table 1: Political Options Regarding Trade-offs*

Finally, a qualification on Bills of Rights. Critics may argue that Bills of Rights do not constrain political behaviour at all. They may point to South Africa, lauded for having a progressive Bill of Rights, yet with substantial human rights abuses, or the US, with numerous instances of executive overreach. Are we to lose faith in BRENNAN and BUCHANAN’s view that rules shape outcomes?

This paper acknowledges that we are living in an imperfect world. Embedded within a political discourse, it is often difficult to determine cause and effect. Therefore, these instruments are not *absolute* constraints but rather, they enable us to understand how rules can be better designed to create *additional* constraints. Finally, imperfect enforcement is also assumed, such that it is difficult to detect each time a regulator infringes rights (which will be referred to as a *deviation*). As no perfect or full information exists, some regulators may evade consequences of infringement.

Now that the scope and assumptions have been considered, we consider the methodology and literature review.

31 However, this remains a superficial assumption given that probabilities remain unknown.
2. Methodology and Literature Review

2.1 Methodology

This paper adopts Law and Economics methodology in Figure 2.

At the broadest level, Public Choice provides assumptions about political decision-making. Under this framework, the principal-agent theory is used to explain the regulator-voter relationship. Filtering down, we use incentive constraints (the Bill of Rights) to solve the principal-agent problem. The method is comparative in nature, examining Australia (no Bill) and the UK (Bill) to see how rules lead to different outcomes.

![Figure 2: Methodology]

2.2 Literature Review

2.2.1 Public Choice

Applying economics to political science, Public Choice adopts methodological individualism as its unit of study and analyses utility-maximising political actors.

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33 BUCHANAN and TOLLISON, 198,p.13.
BUCHANAN and TULLOCK’S *The Calculus of Consent* (1962), reveals that political processes are dominated by self-interested individuals, rent-seeking and pressures from interest groups.\(^{34}\) Demonstrating limits of the legislature based on discretionary executive powers, BUCHANAN advocates maximising consent through unanimity voting.\(^{35}\) Whilst this generally remains impracticable, this view can be applied to Bills of Rights: a tool that maximises consent by constraining the majority’s root production of law.\(^{36}\)

However, Public Choice is not without its critics. Political Scientists have argued it restates existing knowledge in rational choice terms and lacks empirical evidence.\(^{37}\) WITTMAN (1995) further argues that democratic institutions remain the most efficient mechanism to achieve Pareto-efficient outcomes.\(^{38}\) However, this contradicts the Virginia School’s viewpoint that unanimity voting achieves efficiency and governments can be sources of failure.\(^{39}\) Further, Public Choice has been criticised for its limitation in determining to what extent private interests dominate decision-making.\(^{40}\) Its universality can also be a limitation, as not all decision-makers seek to maximise private interests.

Whilst it is not within the scope of this paper to debate against criticism of Public Choice itself, a few words can be said on why it applies here. First, MUELLER (2003) has dispelled the argument that Public Choice lacks empirical evidence by providing extensive examples of its positive and normative usefulness.\(^{41}\) Second, Public Choice is

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\(^{34}\) SHAW, 2002.
\(^{35}\) GINSBURG, 2009, p.3.
\(^{36}\) This paper does not concentrate on another framework, Political Economics, as it does not attempt to minimise majoritarian exploitation of the minority and overlooks Public Choice. See BLANKART and KOESTER, 2005; PERSSON and TABELLINI, 2000;2005.
\(^{37}\) GREEN and SHAPIRO, 1994, p.6.
\(^{38}\) BLANKART and KOESTER, 2005,p.4 include other economists such as BECKER (1983), PELTZMAN (1976) and POSNER (1974).
\(^{39}\) BLANKART and KOESTER, 2005, p.5.
\(^{40}\) EPSTEIN, 1990,p.3.
\(^{41}\) MUELLER cited in BLANKART and KOESTER, 2004, p.5.
a good “fit” for this paper when one considers which kind of settings require which kind of rules. Unlike markets which have endogenous constraints, institutional rules can be reformed to assist regulators in making difficult trade-offs. The Virginia approach is favoured as it recognises democratic limitations, such as problems with majoritarian voting. The relevance of this in the counter-terrorism context will be highlighted later.

Third, the assumption that regulators maximise social welfare can be refuted, as generally such a view holds when sufficient constraints exist for regulators. However, Australia sits outside this assumption due to its weak substitutes. This establishes a ‘compliance black hole’ which may cause regulators, at times, to favour counter-terrorism measures to the detriment of rights.

A sub-field of Public Choice, Constitutional Political Economy explores the legitimacy of state action and implications arising from rule change. As costs of collective action hinder efforts to maximise individual preferences, this paper adopts HOBBES and BUCHANAN’s model of the Constitution as a social contract, embodying consensual majoritarian values.

### 2.2.2 Principal-Agent model

The principal-agent construct, considered by JENSEN and MECKLING (1976) describes a contractual relationship where the principal should benefit when an agent performs some task on their behalf. Agency problems arise when the agent maximises their self-interest and “shirks” from the principals’ interests; here the protection of rights. This is possible when efforts are unobservable by the principal due to informational asymmetry.

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43 SALZBERGER and VOIGT, 2009,p.198.
44 POSNER, 2000,p1.
For our purposes, constituent voters are principals whose interests should be advanced by political agents.\textsuperscript{45} Two agency models are relevant: the lawmaker (legislative branch) and regulator (executive branch) (\textbf{Figure 3}).\textsuperscript{46} In his own right, the lawmaker is principal for the regulator, who has delegated authority to exercise discretion in applying the law.\textsuperscript{47}

One solution to the principal-agent problem is to design contracts which correct agents’ incentives. Constitutions serve as principal-agent contracts that provide incentives, through sanctions and rewards, via elections and constitutional checks and balances.\textsuperscript{48} This model analyses how an additional constraint, the Bill of Rights, safeguards certain positions for principal voters.\textsuperscript{49}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3.png}
\caption{Principal-Agent Models}
\end{figure}

\textsuperscript{45} YOU, 2015,p.29.

\textsuperscript{46} Both agents are relevant for this paper; however, there will be an emphasis on the executive branch.

\textsuperscript{47} In his bureaucratic principal-agent model, NISKANEN, 1971 made rent-seeking assumptions about how bureaucrats maximise self-interest by expanding budgets and exploiting the knowledge of what benefits and costs legislators attach to goods and services.

\textsuperscript{48} MUELLER, 2003,p.636.

\textsuperscript{49} As a sidenote, as Public Choice cautions about majority rule, majoritarian voters arguably also act as agents to promote interests of all constituent principals, including minority voters (eg. asylum seekers, minors). Such characterisation reveals distributional problems, as majority agents seek to shift costs onto the minority principal, such as “unfair” laws on potential suspects. Despite this, majority rule remains the most socially tolerable option for democracy. See BRENNAN and BUCHANAN, 1985, p.128-129.
2.2.3 Fundamental Rights

The principal-agent problem reveals how regulators can slightly favour increased counter-terrorism measures, which can be detrimental to principals’ fundamental rights. This section considers whether something can be said about distributive effects on specific rights. The literature gravitates to the affirmative.

Recall that fundamental rights can be divided into two categories: physical integrity rights and civil rights. Upon first glance, one may assert that physical integrity rights apply to everyone. This holds true if legislators under the “veil of ignorance” make balanced laws when facing uncertainty about social positions and preferences. However, if the veil is lifted, it becomes clearer how rules disproportionally affect different societal groups. That is why, if one considers how counter-terrorism affects physical integrity rights (eg, no torture or disappearances), these laws relate to suspects’ rights. In contrast, civil rights (eg, free speech) affect everyone and can be described as majoritarian rights. This distinction is supported by LONDRAS and DAVIS (2010), who refer to the concept of “othering.” They argue that physical integrity rights are more likely to be adversely affected by counter-terrorism measures than civil rights.

From an empirical perspective, this hypothesis has received backing from panel data (1982–2002) conducted by DREHER, GASSEBNER AND SIEMERS (2010). The study found that terrorism significantly diminished government respect for physical integrity rights, but not civil rights and liberties. PIAZZA and WALSH (2009) also found that states experiencing terrorism were marginally more likely to participate in disappearances and extrajudicial killings, but did not restrict civil rights as much. Survey evidence by VISCUSI and ZECKHAUSER (2003) also found that non-white

50 LONDRAS and DAVIS, 2010, p.38.
51 DREHER, GASSEBNER and SIEMERS, 2010, p.66.
52 PIAZZA and WALSH, 2009, p.144.
respondents were more averse in supporting targeted screenings at airports than white respondents, largely driven by the probability that they constituted that minority group.\textsuperscript{53}

Now that the distinction has been made between these subsets of rights, the puzzle still remains. Why are there adverse distributional effects on physical integrity rights? Public Choice will piece this puzzle together in Section 3.

\textbf{2.3 Where do we stand?}

Whilst extensive Public Choice theories have analysed effects of rules as incentive constraints, current literature has not married contractarian and principal-agent models to explain Bills of Rights as incentive constraints. Nor have practical implications been reviewed in a jurisdiction without a Bill of Rights, specifically, concerning counter-terrorism.

This paper (re)constructs the problem from a Law and Economics “contractarian” stance. The problem is that of gaps. The more uncertainty (“gaps”) within a contract, the easier it is for agents to pursue self-interest through loopholes and greater discretion. If Bills of Rights form part of the contract, they are gap-reducing instruments: they clarify regulator’s obligations towards rights and leave less room for “bad” decision-making.

Before delving into this construction, we must first consider how rights are already protected. The majority/minority rights argument is further developed, followed by an analysis of what constitutes good rules. Finally, the Australian and UK frameworks are compared to see if they have such good rules.

\textsuperscript{53} VISCUSI and ZECKHAUSER, 2003, p.11.
3. Setting the Scene: The Protection of Fundamental Rights

Before plunging into an Australia/UK comparison, we consider why minority rights are more adversely affected than majoritarian rights, at the margin.

3.1 Majority and Minority Rights

The previous section considered how physical integrity rights could be thought of as minority rights, and civil rights could be majoritarian rights. Building on this, we attempt to explain adverse distributional effects on the former, through Public Choice.

One relevant factor stems from interest group theory - how interest groups exert influence to further private interests.\(^{54}\) OLSON (1965) espoused that large, dispersed groups faced higher formation and co-ordination costs when pursuing collective action, therefore smaller, concentrated groups made more powerful lobby groups.\(^{55}\) Arguably, most minorities could fall into the former category as dispersed groups with minimal influence.\(^{56}\) Unable to defend minority interests, their rights may be open to more frequent, aggressive political targeting.\(^{57}\)

Another reason is that the vote-maximising regulator may be more willing to compromise minority rights in order to maximise political return, as minority rights means minority votes. Recalling that the benevolent leader was cast aside, the devil asks: why appease the few, at the expense of the many? This has merit in Australia, as some judicial decisions protecting rights have been overturned or delayed by legislative decisions.

\(^{54}\) BECKER cited in COE and WILBER, 1985,p.141-142.
\(^{55}\) See, generally, OLSON, 1965.
\(^{56}\) DOWNS, 1957 cited in DWIGHT, 2013, p.166.
\(^{57}\) For instance, Australian churches were strong lobby groups opposing a Bill of Rights, fearing it would empower minority religious groups. See RICHARDSON, 2013, p.581.
and executive branches, particularly in areas of “minimal electoral risk…in relation to the human rights…already disadvantaged by our political and legal system.” Further, as some minorities may not have voting rights, or only limited votes at the local level (where questions of rights are not in issue), their interests will not be captured.

Additionally, the “tyranny of the majority” reveals how majoritarian agents may shift costs onto minorities to maximise their own rights. The majority may pressure the regulator to minimise threats to public safety, hence “their liberty for our security.” Subsequently, the risk-averse regulator opts for the electorally safer avenue and over-produces security.

These dangers can arise as outcomes where institutional structures are poorly designed. Red flags should therefore be raised in Australia; as a pluralistic democracy with many “others” (ethnic, religious and social minorities), the will of the majoritarian “self”, as represented through parliament, may generate troubling outcomes. New counter-terrorism measures, coupled with no Bill of Rights, has already led to alienation of minorities, disproportionately affected Muslim communities, and altered racial profiling practices. This justifies the creation of “good rules” to constrain political agents (and indirectly, majoritarian tyranny). The following section considers how this can be achieved.

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58 Cases related to asylum seekers, refugees and HIV-positive soldiers. For a list of cases and political responses, see. WALKER, 1995.
59 This proposition holds up to the point where majority voters stop having altruistic considerations, as part of their individual well-being, to protect minority rights (KAPLOW and SHAVELL, 2003,p.332).
60 LONDRAS and DAVIS, 2010,p.38; See also a hypothetical terrorist scenario where it is demonstrated how the US majority would easily support policies against minorities in CAREY, 2010, p.400.
61 IGNATIEFF, 2005, p.58.
62 See studies cited in RICHARDSON, 2013, p.581-582.
3.2 Normative analysis of “good rules”

Now that “good rules” have been deemed necessary, what constitutes better rule design? It depends how rules influence behaviour. *Homo economicus* assumes that agents collect information and make rational choices according to utility-maximising preferences. However, if this does not explain all behaviour, Behavioural Law and Economics concepts such as “nudging” may provide further guidance.63 “Good rules” can transform bad agents into good ones if they learn to follow rules (assuming they are punished and learn for future periods). However, if rules are removed, extrinsic motivations may arguably “crowd out” intrinsic benevolent motivations.64 If this theory holds, it creates certain expectations about rulers’ behaviour. KANT argues that a state should be “soluble, even for a nation of [intelligent] devils.”65 Designing new rules for benevolent leaders (at least, those not crowded out) would not minimise harm as they would have complied with the rules anyway. That is why rules must be robust from deviations – to constrain dictators.

How can rules be robustly designed? This can be achieved through two constitutional mechanisms: law for law production (procedural norms) and law which mirrors the will of the people (substantive norms).66 These substantive norms, produced by the “government of the people, by the people, for the people,”67 reflect the most rights which individuals expect the state to uphold. This is generally reflected through a Bill of Rights; a yardstick for the state in determining limits to its own actions. The more substantive protections there are, the better safeguards exist for rights.

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63 SUNSTEIN and THALER, 2008.
66 PARDO and SCHWARTZ, 2007, p.82.
The notion that certain rights are inviolable means that they should be constitutionally entrenched so that the state cannot modify them through ordinary amendment procedures (as a referendum is needed). By committing to rights in a legally-binding contract, states are aware that breaches could lead to local and global repercussions. However, Bills of Rights can also be statutorily enacted through statute, which is a weaker constraint given that it allows for parliamentary abrogation.

In differentiating Bills of Rights, can something be said about the role of judges? Under the constitutional form, judges can strike down laws which are inconsistent with human rights. This promotes judicial supremacy as judges have the final say. Under the statutory form, judges may issue non-binding statements of incompatibility which can be overridden by the legislature. This promotes parliamentary supremacy, as parliament has the final say. Clearly, the constitutional form is superior, as it elevates the role of judges as rights protectors. Despite what political agents (and majoritarian principals) desire, the “guard of the guardians” ensures a minimum standard of rights protection; that is, they hold majorities to their pre-commitments for future periods.

If the constitutional form offers the strongest constraints, why does this paper focus on the UK’s statutory form? This is justified for three reasons. First, the UK’s model is “quasi-constitutional” in nature, based on the rights it protects and the entitlements it

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69 KEITH, 2002,p.112.
70 PARKINSON, 2009.
71 This applies in continental Europe, Latin America and parts of Asia. Constitutional courts, which sit outside conventional judicial structures, can enforce Bills of Rights. This alters “political equilibrium and results in a greater margin of protection for political and other minorities” as rulers cannot disregard the “political balance”. See ISSACHAROFF,2011,p.1012; However, the debate has often spun the other way, with courts arguably having too much power. Judges have been criticised for expanding or replacing original constitutional meaning to protect rights. See GARLICKI, 2007, p.47;67.
72 PARKINSON, 2009.
73 Australia perceives parliament as the primary guarantor of rights, with courts playing a subsidiary role in granting remedies. This reveals how executive and legislative branches have, on occasion, sought to override or delay judicial decisions which protect rights. See WALKER, 1995, p.239; STONE and BARRY, 2014,p.772; BARNES, 2011.
grants individuals against the state.\textsuperscript{75} The UK is uniquely placed as it is incorporates the European Convention on Human Rights (ECHR) into domestic law. It has accepted the jurisdiction of the European Court of Human Rights (ECtHR) which creates binding judgements on state parties.\textsuperscript{76} Therefore, the UK has shifted power to judges, whilst preserving parliamentary supremacy. Second, comparative methodology calls for intra-institutional similarities to be made, so effects of differences can be analysed. There are parallels between Australia and the UK’s institutional design: Commonwealth roots, common law systems and Westminster parliamentary democracy.\textsuperscript{77} Third, a pragmatic viewpoint is adopted, informed by past debates, revealing that it is very unlikely that Australia would adopt a constitutional Bill of Rights. This leads us into the next section, which compares both countries’ Human Rights Frameworks.

3.3 Australia’s Human Rights Framework

To adopt, or not to adopt a Bill of Rights in Australia, that is the question. Throughout its history, there have been at least nine attempts to introduce a Bill of Rights.\textsuperscript{78} In 2009, the National Human Rights Consultation Committee (chaired by Father Frank Brennan) recommended a federal Human Rights Act,\textsuperscript{79} which would create a statutory Bill of Rights. The Government decided against this and instead implemented the Human Rights (Parliamentary Scrutiny) Act 2011 (‘HRA’), the centrefold of Australia’s Human Rights Framework. This Act establishes a Parliamentary Joint Committee on Human Rights which considers, \textit{ex ante}, whether bills and legislation are compliant with

\textsuperscript{75} NOLAN and ROBERTSON, 2011,p.64.
\textsuperscript{76} ECHR, Article 46. Further, under the Human Rights Act 1998 (UK) s3(1), courts are compelled to interpret cases in line with ECHR provisions, however, they cannot invalidate legislation. See FELDMAN, 2012; MILLER, 2011,p.4.
\textsuperscript{77} KILCULLEN, 2000.
\textsuperscript{78} PARLIAMENT OF AUSTRALIA, 2015.
\textsuperscript{79} Ibid.
international human rights treaties.\textsuperscript{80} It also requires legislation to contain a human rights statement of compatibility.\textsuperscript{81}

In 2011, Australia rejected a recommendation from international governments to introduce a federal Human Rights Act.\textsuperscript{82} The government stated that the current regime already safeguarded rights.\textsuperscript{83} However, Bill of Rights proponents have argued that the current regime remains inadequate, and that common law is a weak mechanism because judicial decisions can be invalidated by statute.\textsuperscript{84} These concerns have been raised in the counter-terrorism context due to executive overreach and limited judicial review.

Before comparing Australia’s approach to the UK, it is useful to briefly discuss Australia’s separation of powers doctrine. As supreme law, Australia’s Constitution vests the legislative body with authority to make law, and the executive body with authority to enforce the law, in accordance to limitations. However, without adequate enforcement, oversight mechanisms remain “toothless tigers”. By far, the most significant oversight is provided by the judiciary, which can protect individuals from unlawful or arbitrary exercises of state power. The High Court can hear constitutional challenges and interpret limits of legislative and executive power. For instance, an Act may be unconstitutional if it allows excessive use of force, or executive power may be unlawful if such force is exercised.\textsuperscript{85} Despite the crucial role played by courts, this in itself does not mean that Australia has robust rules. To consider why, Australia’s Human Rights Framework will be compared to the UK in Table 2.

\begin{itemize}
\item \textsuperscript{80} Ibid.
\item \textsuperscript{81} Ibid.
\item \textsuperscript{82} COYNE, 2014.
\item \textsuperscript{83} DEPARTMENT OF ATTORNEY-GENERAL, 2011.
\item \textsuperscript{84} FRENCH, 2010,p.27-28.
\item \textsuperscript{85} It should be noted that judicial review differs from merits review, which considers errors of fact. This is overseen by the Administrative Appeals Tribunal and Ombudsman. See BRENNAN,1997,p.145.
\end{itemize}
<table>
<thead>
<tr>
<th>Mechanism</th>
<th>Australia</th>
<th>UK</th>
<th>Implications for protecting rights</th>
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</thead>
<tbody>
<tr>
<td><strong>PRINCIPLES AND DOCTRINES</strong></td>
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</table>
| Parliamentary Sovereignty  | Yes.      | Yes.   | Parliament has the absolute right to enact, amend and repeal legislation under the Constitution. Democracy, public attitudes, the common law and statutory interpretation constraint Parliament.  
| Responsible Government     | Yes.      | Yes.   | The executive is accountable to the legislature, which is elected by citizens. Democratic checks and balances provide incentives for effective governance. 
| Separation of Powers       | Yes.      | Yes.   | This doctrine separates the three branches of government: the legislature, executive and judiciary. This protects rights by ensuring an independent judiciary and accountability of the executive to the legislature. The latter two branches cannot exercise judicial power.  
Bowcott, 2012. |
| Federalism                 | Yes.      | To an extent. Federalism allocates power for federal and state purposes, enabling judicial review. 
Federalism limits Parliament’s ability to make laws outside its enumerated powers.  
BOWCOTT, 2012. |
| **SUBSTANTIVE MECHANISMS**  |           |        |                                    |
| Constitution               | Yes – Written. Australia’s Constitution is divided between federal and State/Territory heads of power.  
Australian Communist Party v The Commonwealth (1951) 83 CLR 1. |
|                           | Yes – Unwritten, with some written aspects and conventions.  
Sources include the Magna Carta, Bill of Rights (1689), Act of Settlement (1701), and European Communities Act (1972).  
Whilst statutes cannot be quashed by 
|                           | Australia’s Constitution safeguards rights better than the UK, given its entrenched nature. It also provides greater legal certainty.  
However, express rights in Australia remain limited.  

*Australian Constitution s 51(xxxi); Bank of NSW v The Commonwealth (1948) 76 CLR 1.*

BOWCOTT, 2012.
FOLEY, 2007,p.289; *The Queen v Kirby; Ex parte Boilermakers’ Society of Australia (1956)* 94 CLR 254, 267-68.
Australian Communist Party v The Commonwealth (1951) 83 CLR 1.
Australian Constitution s 51(xxxi); Bank of NSW v The Commonwealth (1948) 76 CLR 1.
Australian Constitution s 80.
KILCULLEN, 2000; BOGDANOR,2011.
<table>
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<tr>
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<th>Australia</th>
<th>UK</th>
<th>Implications for protecting rights</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>commerce and intercourse, freedom of religion under Commonwealth law, and non-discrimination on grounds of State residence.</td>
<td>judges, a “quasi-constitution” is created, whereby judges give effect to ECHR rights.</td>
<td>A Bill of Rights enables individuals to sue the government for rights infringements. This acts as an additional constraint.</td>
</tr>
<tr>
<td></td>
<td>The Constitution is judicially reviewable and can be amended by double majorities through a referendum.</td>
<td>Statutory aspects are enforceable by courts and conventions are enforceable by public opinion.</td>
<td>At its best, Australia’s Act promotes ex ante review to ensure laws are rights-compatible. However, there is no recourse for litigants. It is also problematic in defining “human rights” on definitions in international rights treaties, most of which have not been implemented.</td>
</tr>
<tr>
<td>Bill of Rights</td>
<td>No.</td>
<td>Yes, the Human Rights Act 1998 (UK). It has “continuing effect” and cannot be repealed by subsequent inconsistent Acts.</td>
<td>The UK approach does not provide absolute legislative constraints as it can be overridden by statute. However, it raises the public profile of rights, forces review of laws to be rights-compatible and enables rights-consistent case law. Further, it would be politically embarrassing for governments to ignore a statement of incompatibility.</td>
</tr>
<tr>
<td></td>
<td>The HRA 2011 establishes the Parliamentary Joint Committee on Human Rights which examines Bills and Acts for compatibility with human rights, and reports to both Houses of Parliament. Two Australian jurisdictions have statutory Bills of Rights: the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic).</td>
<td>This Act gives effect to ECHR rights. The Act obliges the Minister, before the second Reading of a Bill, to make a statement of compatibility with human rights. If a statement cannot be made, the Minister must explain why the government wishes to proceed with the Bill. A superior court can issue a declaration of incompatibility which is not binding on the legislature. Ministers may wish to seek parliamentary approval for</td>
<td></td>
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</tbody>
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96 Australian Constitution s 92.  
97 Australian Constitution s 116.  
98 Australian Constitution s 117.  
99 Australian Constitution s 128.  
102 PARLIAMENT OF AUSTRALIA, 2015.  
103 Australia has one federal jurisdiction (Commonwealth), six states (including Victoria) and two territories (including the Australian Capital Territory).  
105 For a full list, see ECHR; LIBERTY (2015).  
107 LIBERTY, 2015.  
remedial orders to amend law. This is supported by a decreasing trend in outstanding statements for implementation.

<table>
<thead>
<tr>
<th>Mechanism</th>
<th>Australia</th>
<th>UK</th>
<th>Implications for protecting rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Law</td>
<td>Yes. The High Court has interpreted the Constitution to give life to implied rights: freedom of political communication, right to vote and the right not to be deprived of personal liberty without due process.</td>
<td>Yes. These include (but are not limited to) the right to liberty, due process, trial by jury, freedom of religion, freedom of speech, freedom of assembly/association, property rights, and the right to vote.</td>
<td>Case law can protect rights by developing rights-consistent law.</td>
</tr>
</tbody>
</table>

- Case Law: Yes. 
  The High Court has interpreted the Constitution to give life to implied rights: freedom of political communication, right to vote and the right not to be deprived of personal liberty without due process.

- Statute: Yes. 
  There are various anti-discrimination statutes. Federal/local civil, administrative and criminal procedures also provide safeguards.

Statutes reflect social values of the day and place pressure on the legislature to amend inconsistent laws. However, they can be easily repealed.

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110 TWOMEY, 2011.
111 NSW STATE LIBRARY, 2013.
112 STONE and CAMPBELL, 2013, p.266.
113 BARRY and CAMPBELL, 2011, p.73.
114 UK JOINT COMMITTEE ON HUMAN RIGHTS, 2015, p.7.
117 Australian Constitution s 75(v); Chu Kheng Lim v Minister for Immigration and Multicultural Affairs (1992) 176 CLR 1.
118 Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97, 111E.
119 R (Bright) v Central Criminal Court [2001] 1 WLR 662.
121 R v Secretary of State for the Home Department, ex p Moon (1996) 8 Admin LR 477, 480F-G.
123 McEldowney v Forde [1971] AC 632, 657F.
126 For full list, see AUSTRALIAN HUMAN RIGHTS COMMISSION, 2015.
### Table 2: Australia/UK Comparison

<table>
<thead>
<tr>
<th>Mechanism</th>
<th>Australia</th>
<th>UK</th>
<th>Implications for protecting rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>INSTITUTIONAL SET-UP</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Independent Courts</td>
<td>Yes. The High Court is independent from other branches of government.</td>
<td>Yes. The Supreme Court is the final court of appeal. There have been disputes about the Supreme Court’s role as a constitutional court, with some contending that it is not as it has no jurisdiction to strike down statutes.</td>
<td>The judiciary can provide checks and balances on the other two branches by 1) interpreting laws without interference and 2) subjecting laws and policies for constitutional review. However, both jurisdictions’ principle of legality states that legislation can interfere with rights if such intention is generated through clear and unambiguous language. The UK’s Bill of Rights provides a minimum guarantee whereas Australia does not.</td>
</tr>
<tr>
<td>Regional structures</td>
<td>No.</td>
<td>Yes. Judges must consider ECHR case law but are not bound by it. The UK is also party to other frameworks, such as the European Social Charter.</td>
<td>The UK is uniquely placed as it must consider regional jurisprudence. This provides a significant constraint not only due to regional pressures, but because it establishes a yardstick which measures domestic standards.</td>
</tr>
</tbody>
</table>

From Table 2, it appears that Australian substitutes remain weak. This results in over-reliance on the common law, statutory interpretation and good faith of politicians. However, reliance is often misplaced. For instance, whilst litigants have brought constitutional challenges against Australia’s counter-terrorism laws, limited express constitutional protections means that there are narrow grounds to challenge laws and

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MASON, 1986, p.3.
HENRY-COMLEY, 2013, p.84.
Coco v The Queen (1994) 179 CLR 427, 437; Somerset v Stewart (1772) Lofft 1;98 ER 499.
executive action. The absence of checks, namely a list of protected rights and formal processes determining violations, provides limited protection. Why might this be? Australia’s rules have imported the UK’s notion of parliamentary sovereignty. This means that judges remain at the outskirts of the debate, their roles being invoked in constitutional questions and statutory interpretation. Meanwhile, the UK has enacted a Bill of Rights, shifting the power balance to favour judges in protecting rights. The relative weight that Australia attaches to lawmakers and regulators appears disproportional. This is problematic as Australian law-making is largely subject to political goals of governing parties rather than parliamentarians, who can be controlled by the executive. In other words, bad rules (ie, minimal constraints) can result in bad outcomes.

Further evidence that Australia attaches less weight to judges is demonstrated by its HRA 2011, which excludes judicial scrutiny of legislation against rights standards. The judiciary also remains subject to Parliament’s statutory directions. As Public Choice warns, these mechanisms inadequately safeguard rights (and minority rights marginally more), demonstrated in many instances of Australia’s history.

Overall, it seems that Australia’s rules do not reflect the desired outcome. The rules should grant the executive branch adequate counter-terrorism powers whilst

134 For instance, the Constitution cannot invalidate rights-inconsistent laws. See BRENNAN, 1997, p.147.
135 THAM and EWING, 2007,p.469.
137 WILLIAMS, 2011,p.1173.
138 For example, when the Howard government gained control in both Houses of Parliament in mid-2005, it passed controversial counter-terrorism laws with minimal scrutiny. See STONE and BARRY, 2014,p.769.
139 BRENNAN, 1997, p.147.
140 WILLIAMS, 2001, refers to the White Australia immigration policy, the “Stolen Generation” (thousands of Aboriginal children were forcibly removed from their families from 1910-1970), mandatory detention of asylum seekers, and mandatory sentencing which disproportionately affected Aboriginal criminals and juveniles. BARRY and CAMPBELL, 2011,p.72 include anti-terror laws as a contemporary example.
proportionally balancing effects on rights. Therefore, rules should be redesigned to create incentives for proportional decision-making.

4. Positive Analysis

The previous section revealed that Australian substitutes remain weak and may not necessarily transfer all KANTIAN devils into angels. How exactly do these rules fall short for rights? This will be explored through a basic utility model.

It should be added that a Bill of Rights is relevant on two levels. For the lawmaker, it acts as a constraint so that unconstitutional laws (ie, laws inconsistent with rights) can be set aside. For the regulator (the subject of this model), the Bill of Rights affects their every application of the law.

4.1 The Model

It is useful to imagine a spectrum of policy choices available to the regulator. The agent-regulator and principal-voter are aware that any choice will involve a trade-off between counter-terrorism measures and fundamental rights. Any trade-off will be acceptable, so long as it remains proportional to achieving both policy goals. However, once the regulator selects a disproportionate response, this implies that the regulator has “deviated” from complying with rights.

Why does this problem arise? Although it is assumed that the agent-regulator will try to fairly balance all interests, it is also assumed that, in maximising their utility, they have a certain professional bias in extending state powers slightly above the necessary level (for political survival and executive aggrandisement). This intrinsic bias may tip the scales in favour of extending counter-terrorism measures over an optimal principal-
voter policy which advances rights.\textsuperscript{141} Two predictions can be made at this point. First, this effect is heightened when there is no benchmark, such as a Bill of Rights. As regulators do not have the right incentives to comply with a non-existent yardstick, there is a risk that they will deviate from advancing the principal’s interest. Second, adverse distributional effects will be marginally greater on minority rights. These predictions will be demonstrated through the model.

Assume a unilateral game with two players: the regulator and the voter. Their relationship is governed by the social contract. The principal’s payoff depends on the agent’s action. The players operate within a two-dimensional policy space: counter-terrorism measures and fundamental rights. Along the spectrum of policy options, the two actions that the regulator can take with respect to rights are (1) comply or (2) deviate. They will select the action which maximises their utility.

To obtain the regulator’s utility function, costs are subtracted from benefits.

**Benefits**

- $[V(x)]$ – expresses the benefit of a political return (as politicians are vote-maximisers)\textsuperscript{142} in the form of an expected vote with probability $x$. If they comply, they can expect increased voter confidence in the political administration in the second period;

- $[R]$ – expresses rent-seeking profit (eg: income transfers or political donations);\textsuperscript{143}

- $[B\pi]$ – expresses professional bias profits (eg: increased staff numbers and budgets).

\textsuperscript{141} POSNER, 2007, concurs that in times of “national emergency”, the trade-off shifts in favour of security.

\textsuperscript{142} DOWNS, 1957, p.28.

\textsuperscript{143} HELM, 2010, p.187.
Total benefits: $V(x) + R + B\pi$.

Costs

- [$C(x)$] – expresses expected loss of credibility or political reputation, resulting from public knowledge of “bad” behaviour.
- [$e$] – expresses amount of effort needed for the regulator to make a decision. Effort depends on conditions in the social contract. Although there may be lower or higher effort exerted in each case, at the baseline, the regulator exerts an intermediate level of effort so that $L < e < H$.

Total costs: $e + C(x)$.

Utility

Overall utility is expressed as: $U_R = V(x) + R + B\pi - e - C(x)$.

Utility-maximising preferences

Conditions to promote certain preferences include:

i) To comply

The utility obtained from complying [C] must outweigh that of deviating [D] so that $C > D$. Benefits of complying must be greater than costs so that $[V(x) + R + B\pi] > [e + C(x)]$.

ii) To deviate

The utility obtained from deviating [D] must outweigh that of complying [C] so that $D > C$. Costs of complying must be greater than benefits so that $[e + C(x)] > [V(x) + R + B\pi]$.
Predicting likely action

i) No Bill of Rights

How can we predict behaviour in a world with no Bill of Rights? This depends on which preference maximises the regulator’s utility. To determine this, the regulator weighs up costs and benefits.

Benefits

- \([V(x)]\) – As the regulator considers the impact of their decision on voters, we can assume \(V(x)\) depends on the type of fundamental right in question. Expected gains from complying with a civil right would be substantial, because this right is majoritarian.

In contrast, physical integrity rights generate a smaller \(V(x)\) as they affect minority suspects. For example, imagine that the regulator has to decide whether to extend detention of a terrorist suspect in circumstances with limited evidence and low likelihood of a pending attack upon release. The regulator may conclude that majority voters would be more concerned about public safety than the suspect’s rights. It may cost more for the regulator to comply. Therefore, the regulator faces the wrong incentives; they may be tempted to extend detention, considering distributional voting effects, even in unwarranted circumstances.\(^{144}\)

This scenario may be exacerbated given that minorities are generally not relevant pressure groups (majority voter altruism, aside).\(^{145}\)

\(^{144}\) The suspect’s utility loss would be significantly larger than society’s costs for releasing the person. See MUELLER, 2011,p.592.

\(^{145}\) The contractarian approach also contemplates “other-regardingness”: people can consider interests of other members of society when maximising utility. See BRENAN and BUCHANAN, 1985, p.36-37.
• [R] – Given private information, it is different to ascertain how substantial R may be. Private security actors may be more influential in seeking to expand counter-terrorism powers because they are more concentrated and can coordinate preferences. They also have more resources than public interest groups, which are largely reliant on donations and volunteers. As a result, the regulator may give more weight to pro-security measures.

• [B\pi] – The regulator is likely to tip the scales in favour of counter-terrorism measures due to the expansion of personal and state power. The larger the expected profits, the more likely that the regulator will act this way.

Costs

• [c(X)] – The regulator may favour counter-terrorism measures where C(x) is low. This suggests that minority rights may be more adversely affected, at the margin, as there may be majoritarian outcry for releasing suspects, for example. However, there is less likelihood of infringement of civil rights, as C(x) would be larger than V(x) (given public pressure and media backlash). Therefore, the regulator has a greater incentive to comply with majoritarian rights.

• [e] – Recall that a Bill of Rights is a gap-reducing instrument which clarifies regulators’ obligations towards individuals. With no Bill of Rights, the regulator is less constrained as more gaps exist in the contract. The regulator calculates which action maximises their utility and what effort level they must exert to achieve that result. It is more probable that bias will lead them towards favouring counter-terrorism measures, and in some instances, deviation. It is

146 See, generally, OLSON, 1965.
also more likely that, without adequate constraints, such action will more adversely affect physical integrity rights at the margin. The question is how to alter incentives to induce compliance.

4.2 Theory of incentive compatibility constraints

Let us assume full information so that the principal can monitor the agent’s effort and subsequent action. If this holds, then the principal can design an incentive compatibility constraint, to maximise the agent’s utility and realign their actions with the principal’s desired outcome.\textsuperscript{147} In other words, \textit{rules} can shape \textit{outcomes}.

The agent must prefer to comply rather than deviate. This means that the rules must be designed in such a way that:

- To comply costs $e = 0; C(x) = 0$
- To deviate costs $e = 1; C(x) = 1$

Therefore, the incentive compatibility constraint would generate $U(c) > U(d)$, because it is “cheaper” for the regulator to comply. In other words, how can we increase political costs and costs of effort to induce the regulator towards compliance? The answer lies with the Bill of Rights.

ii) Bill of Rights

How may a Bill of Rights change this situation? It fills the gaps. Substantive rights become enumerated and more constraints exist in the contract. Because the focus is on constraints, it is assumed that the “benefits” side of the utility function does not change. However, a Bill of Rights would increase the “costs” side in two ways.

\textsuperscript{147} CAILLAUD and HERMALIN, 2000, p.6.
First, the assumption is that high effort will need to be exerted by the regulator should they wish to deviate. The agency problem is now reduced because there are less gaps in the contract, which leaves less room to depart from the rules. The regulator would need to invest more effort into devising creative methods, or seeking legal loopholes, to deviate. If the regulator complies, the level of effort remains the same as the baseline level, since the payoff structure is not altered by an additional constraint.

Second, C(x) is also affected; deviation generates a high expected political cost in the second period, as the regulator’s actions are observable and monitored by voters. With increased accountability, it is far more detrimental to deviate.

Therefore, by changing the payoff structure and making it more costly to deviate, it is more probable that the regulator will alter their preference and comply. Although minority rights were adversely affected at the margin, the Bill of Rights decreases this probability by altering regulators’ incentives (through increasing costs of deviating).

*Table 3* summarises these findings:

<table>
<thead>
<tr>
<th>V(x)</th>
<th>No Bill of Rights</th>
<th>Bill of Rights</th>
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<tbody>
<tr>
<td><strong>Civil rights</strong> (assuming B &gt; C )</td>
<td>More likely to comply</td>
<td>More likely to comply</td>
</tr>
<tr>
<td><strong>Physical integrity rights</strong> (assuming C &gt; B)</td>
<td>More likely to deviate</td>
<td>More likely to comply</td>
</tr>
</tbody>
</table>

*Table 3: Incentive Compatibility Constraints*
5.0 Application

Does the theory hold in practice? The following section applies the model to examples from Australia and the UK to demonstrate how incentives change with a Bill of Rights.

5.1 Metadata Retention Laws

Some jurisdictions have metadata retention laws for counter-terrorism surveillance and criminal investigation purposes. However, these measures trade-off majoritarian rights, namely privacy. As this example is from 2015, we can only predict how regulators will behave. However, this example perfectly captures the other agency problem: the behaviour of legislators.

5.1.1 The Australian Case

Pre-2014, the Australian government had limited powers to access private-sector data. In 2014 a metadata retention Bill was proposed. The Parliamentary Joint Committee on Human Rights stated the Bill was “over the top and open to misuse” and the Senate Standing Committee for the Scrutiny of Bills described it as “ill-defined and far-reaching.” Despite this, on 13 April 2015, the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (Cth) (‘TIAADRA’) was enacted. The Act mandates that telecommunications service providers retain and secure metadata

148 Metadata is “data about data” such as who, when, where and how (not content itself). See ATTORNEY-GENERAL, 2015.
149 However, there are exceptions for intelligence agencies and law enforcement. Eg, The Australian Federal Police do not need a court order to obtain documents relevant to serious terrorism offences (Crimes Act 1914 (Cth) s 3ZQM, s 3ZQN). Similarly, ASIO has special powers relating to search warrants and special computer access powers if the Minister issues a warrant (Australian Security Intelligence Organisation Act 1979 (Cth) s25A). See SVANTESSON, 2012,p.270.
150 COYNE, 2014.
for two years.\textsuperscript{151} The law has been criticised for potential implications on civil rights. Even the two year retention period appears disproportionate to Australian intelligence agency claims that 90\% of its current access requests were for less than 12 months (similar to international cases, aside from South Africa, the only other country with a two year retention period).\textsuperscript{152} Other critics have suggested that Australian politicians are legislating in an area with minimal evidence base.\textsuperscript{153}

One major concern is that law enforcement agencies do not need to obtain a warrant or access data through an independent approval process.\textsuperscript{154} Specifically, in determining whether a warrant is needed, the decision can be made by the Minister, a ‘Part 4-1 issuing authority’ or Director General of Security in emergency cases.\textsuperscript{155} Whilst the Part 4-1 issuing authority can comprise of consenting judges, magistrates, and Administrative Appeals Tribunal appointees who have enrolled as legal practitioners for at least five years, it is the Minister who makes the appointment.\textsuperscript{156} Such appointments demonstrate minimum independence procedures under the scheme.

Moreover, the lack of oversight led a police whistle-blower to remark that the Act can be easily abused.\textsuperscript{157} A 2013 surveillance incident where five Members of Parliament were subjects of data surveillance by the Federal Police without a warrant suggests the risk of potential wide-scale misuse and highlights the importance of prior external review.\textsuperscript{158}

\begin{flushleft}
\footnotesize
\textsuperscript{151} TIAADRA, s 187C.
\textsuperscript{152} HUMAN RIGHTS LAW CENTRE, 2015.
\textsuperscript{153} See Dutch, German and Danish remarks in GRUBB, 2015.
\textsuperscript{154} HUMAN RIGHTS LAW CENTRE, 2015.
\textsuperscript{155} McGOVERN and KALLENBACH, 2015.
\textsuperscript{156} TIAADR Act, s 6DC.
\textsuperscript{157} GRUBB, 2015. [Accessed 29 July 2015].
\textsuperscript{158} HUMAN RIGHTS LAW CENTRE, 2015.
\end{flushleft}
Another major concern is executive overreach, as the Attorney-General has wide discretion to make declarations about the services, types of data and authorities that have access to data.\textsuperscript{159} The problem is that decisions are not judicially reviewable under the \textit{Administrative Decisions (Judicial Review) Act 1977 (Cth)}.\textsuperscript{160} Judicial review still exists under common law, but entails very complex procedures.\textsuperscript{161} Moreover, there is no right of redress for litigants because individuals are unable to know if they have been subjects of access.\textsuperscript{162}

More significantly, most retention specifications will be prescribed by regulations and will not be subject to Parliamentary scrutiny.\textsuperscript{163} For example, the Attorney-General may declare an authority to be a criminal law enforcement agency through legislative instrument.\textsuperscript{164} This reveals that potentially powerful groups may be included, despite initial exclusion. For instance, the Australian Securities and Investments Commission head, Greg Medcraft, already expressed his desire to apply for access.\textsuperscript{165} It is yet to be seen whether this legislation constitutes an incorrect delegation of power.\textsuperscript{166}

Perhaps the most substantial concern is that Australia’s law was largely modelled around the European Union (EU) Data Retention Directive, which was invalidated in 2014 after being found in breach of rights by the European Court of Justice (ECJ) in the \textit{Digital Rights Ireland case}.\textsuperscript{167}

\textsuperscript{159} McGovern and Kallenbach, 2015
\textsuperscript{160} Ibid, 2015
\textsuperscript{161} Coyne, 2014.
\textsuperscript{162} Ibid.
\textsuperscript{163} McGovern and Kallenbach, 2015
\textsuperscript{164} Tiaadra, s 110.
\textsuperscript{165} Coyne, 2014.
\textsuperscript{166} Law Institute of Victoria, 2014,p.11.
\textsuperscript{167} It was incompatible with the ECHR (art. 7 and 8), and European Union Charter of Fundamental Rights (EUCFR) (art. 8). See Decision of the ECJ in Joined Cases C-293/12 (Digital Rights Ireland) and C-394/12 (Kärntner Landesregierung), 8 April 2014.
As has been observed, there are numerous criticisms about this law, as majoritarian rights are traded-off with increased counter-terrorism. Why did political agents privilege counter-terrorism measures so extensively over rights? If institutional rules are not robust enough, then political agents are well within their scope of power to do so. Yet is this what principal-constituents really want? Before applying the theory of incentive compatibility constraints, we briefly examine the UK position.

5.1.2 The UK Case

The UK has enjoyed access to systematic telecommunications data through the voluntary Code of Practice on the Retention of Communications Data for service providers, under the Anti-terrorism, Crime and Security Act 2001. The Regulation of Investigatory Powers Act 2000 (‘RIPA’) also enabled the Secretary of State to authorise warrants requesting interception of communications of individuals over public telecommunication systems. The ECtHR has held that these safeguards adequately protected privacy. Moreover, there are also special provisions for judicial approval for local councils, as well as an Investigatory Powers Tribunal which investigates complaints. The UK also has independent oversight by the Information Commissioner, and cooperates with the EU Data Protection Supervisor to promote consistent data protection.

168 WARD, 2014.
169 RIPA Part 1 Chapter 1.
173 Data Protection Act 1998, s 6 and Schedule 5.
174 EUROPEAN DATA PROTECTION SUPERVISOR, 2015.
The UK recently gave effect to the EU Data Retention Directive through 2009 Regulations.\textsuperscript{175} Following invalidation of the Directive, the UK introduced emergency legislation, the \textit{Data Retention and Investigatory Powers Act 2014} (‘DRIPA’). The Act enables the Secretary of State to issue retention notices to telecommunications service providers.\textsuperscript{176} It was justified to ensure law enforcement and intelligence agencies could maintain access to investigate criminal conduct.\textsuperscript{177}

Now we consider how the jurisdictions compare in balancing counter-terrorism/rights.

\subsection*{5.1.3 Comparative Analysis}

Australia and the UK have no constitutional recognition of privacy.\textsuperscript{178} However, UK breach of confidence actions now include misuse or wrongful dissemination of private information,\textsuperscript{179} and Australia is moving towards a tortious cause of action for invasion of privacy.\textsuperscript{180} Both countries also have privacy statutes with exceptions for mass communications surveillance and access.

In Australia, data is protected under the \textit{Privacy Act 1988} (Cth) and Australian Privacy Principles, so the Privacy Commissioner can examine industry compliance and monitor non-disclosure obligations.\textsuperscript{181} The Inspector-General of Intelligence and Security will oversee metadata access by the Australian Security Intelligence Organisation (ASIO). Complaints can also be issued to the Commonwealth Ombudsman; however with a high caseload, it remains to be seen whether it can act as an effective complaints mechanism. The Ombudsman also relies upon knowledge of violations, which is restricted when

\textsuperscript{175} Data Retention (EC Directive) Regulations 2009 (E.I 2009/859) (UK).
\textsuperscript{176} REILLY, 2015.
\textsuperscript{177} WARD, 2014.
\textsuperscript{178} RUBINSTEIN, NOJEIM, and LEE, 2014,p.107.
\textsuperscript{179} Campbell v MGN Ltd [2004] 2 AC 457.
\textsuperscript{181} ATTORNEY-GENERAL, 2015.
“national security” is invoked.182 Additional safeguards include public reporting requirements for the Attorney-General’s Department, a journalist information warrant regime, Public Interest Advocates for journalist warrants, and parliamentary committee reviews.183

It may sound good on paper; however, critics have argued that Australia’s more lenient laws are disproportionate to these proposed safeguards.184 As we’ve seen, “bad rules” lead to “bad outcomes.” As discretionary executive powers are subject to limited judicial scrutiny, Australia attaches less weight to the role of judges, and indirectly, to rights. Therefore, applying our principal-agent model, more gaps exist in Australia’s social contract. More gaps means more incentive for biased regulators to favour counter-terrorism measures. As this law relates to majoritarian rights, U(c) should be greater than U(d), considering regulators’ political return. However, there may be cases where regulators will be motivated to deviate from respecting rights.185 How can we minimise the occurrence of these cases?

Introduce a Bill of Rights, and “good rules” should lead to “good outcomes” by altering incentives. Litigants can access courts, and courts can enforce rights. As the Bill of Rights minimises gaps in the social contract, it increases costs of effort and political costs of deviation, shifting regulators’ preferences towards compliance. More caution is now exercised by politicians when making decisions. This can be demonstrated by the UK example, which contains less gaps in its social contract. The Bill of Rights enables the judiciary to interpret laws and actions consistent with rights. It implements article 8 of the ECHR and is influenced by Strasbourg jurisprudence.186 Based on that, UK

182 MOLNAR and DALY, 2015.  
183 ATTORNEY-GENERAL, 2015.  
185 As a qualification, the Bill of Rights is not an absolute constraint; there may be cases of lower costs, which may induce deviation.  
186 Ash v McKennitt [2007] 3 WLR 194, 11.
Ministers must certify that all bills are ECHR-compliant, which means that the executive must act in accordance with these rights and the judiciary must consider the rights. Further, the EUCFR, which includes article 7 (right to privacy) and article 8 (data protection) also applies, to the extent that those rights are recognised in UK law.

In July 2015, the UK High Court held that DRIPA violated EU law on two grounds. First, the retention notice did not provide clear and precise rules for access and use of metadata to be strictly limited to preventing and detecting well-defined crimes or prosecutions. Second, there was no prior judicial or administrative review. This regime will have to be rewritten to mandate judicial or independent approval for access.

Thus, the Bill of Rights can be a gap-reducing instrument, both in legislative and executive spheres. Increased accountability and knowledge of new “rules of the game” creates an incentive compatibility constraint which alters agents’ incentives. As we will now explore, this is particularly important for minority rights: the essence of what Bills of Rights aim to protect.

5.2 Physical Integrity Rights

Physical integrity rights will now be considered. The focus is on pre-charge detention of suspects. First, we examine the Australian ‘Haneef case’ relating to provisions under Part 1C of the Crimes Act 1914. Second, we compare Australian and UK control order schemes. Whilst control orders were not applied to Haneef, police had contemplated it as an alternative measure. The regime illustrates substantial differences between Australia and the UK.

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190 Ibid, 114.
191 Ibid.
5.2.1 An Australian Case

Pre-charge detention of suspects by the Australian Federal Police (AFP) can occur under three regimes: pre-charge detention and questioning under Part 1C of the *Crimes Act 1914* (up to 20 hours excluding “dead time”), control orders under Division 104 of the *Criminal Code Act 1995* (‘Criminal Code’) (leading to potential house arrest) and preventative detention under Division 105 of the *Criminal Code* (up to 24 hours with extension up to 48). We first turn our focus to the case of Dr Mohamed Haneef, a victim of the *Crimes Act* regime. This case invoked significant criticism of police and bureaucrats, based on poor decision-making and inherent biases.

Dr Haneef was an Indian doctor who worked at the Gold Coast Hospital in Queensland, Australia. On 14 July 2007 he was charged with recklessly providing support to a terrorist organisation, as his SIM card was allegedly connected to attempted UK terrorist attacks. The timeline of events can be seen in *Figure 4.*

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**Figure 4**

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Haneef gave SIM to second cousin Sabeel Ahmed in UK (expired in August).</td>
<td>25 July 2006</td>
</tr>
<tr>
<td>Kafeel crashed jeep at Glasgow Airport; Sabeel arrested by police for withholding evidence.</td>
<td>30 June 2007</td>
</tr>
<tr>
<td>UK Police find no SIM at scene. No attempt by AFP/CDPP/Qld Police to correct information.</td>
<td>8 July 2007</td>
</tr>
<tr>
<td>Ahmed’s brother Kafeel Ahmed involved in 2 failed London bombings.</td>
<td>29 June 2007</td>
</tr>
<tr>
<td>Haneef arrested; held without charge for 12 days.</td>
<td>2 July 2007</td>
</tr>
<tr>
<td>Charged with recklessly providing support to terrorist organisation.</td>
<td>14 July 2007</td>
</tr>
</tbody>
</table>

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192 McGARRITY and WILLIAMS, 2010, p.50.
193 RIX, 2009, p.127.
194 Ibid; Contrary to *Criminal Code* s 102.7(2).
When Haneef was arrested, police officers alleged his SIM was found in Kafeel’s jeep which crashed into Glasgow Airport. It was later revealed that the SIM was actually in Sabeel’s home in Liverpool at the time of his arrest. The UK police had known for six days prior to Haneef’s charge that the SIM was not at the scene of the crime. Despite having knowledge of this, the AFP, Commonwealth Director of Public Prosecutions (CDPP) and Queensland Police Service (QPS) did not seek to correct the information and ignored crucial evidence which demonstrated that Sabeel had no knowledge of Kafeel’s intentions. As one scholar remarked, “the AFP, the CDPP, and, to a lesser extent, the QPS ignored evidence that Mohamed Haneef was innocent.”

When the Magistrate’s Court extended the investigative detention period five times, Haneef had no opportunity to access and correct significantly inaccurate information, as

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195 *Crimes Act 1914 (Cth)* s 3W(1).
196 *RIX*, 2009 p.128.
198 *RIX*, 2009 p.128.
199 Ibid.
200 Ibid.
the AFP prevented disclosure on public interest grounds. Just hours after being granted bail, the Immigration Minister, Kevin Andrews, cancelled Haneef’s work visa for failing the “character test” under s 501(3) of the Migration Act 1958 (Cth). This prevented Haneef from being released from custody. This decision was made despite the QPS repeatedly advising the AFP that there were insufficient grounds to charge Haneef, as well as ASIO’s repeated advice that Haneef was not a security threat. The Federal Court of Australia finally set aside the visa cancellation decision on 21 August 2007.

Further, emails between AFP and Ministerial staff members revealed that there was communication for a “contingency plan” on how Haneef could remain in custody if granted bail. The AFP officers in charge were also criticised for using deficient evidence, and the “war on terror” to advance professional biases. The executive branch was criticised for using the legal system to advance its election agenda.

At its heart, this case illustrates how Australian regulators may not possess the right incentives and can adversely affect minorities due to “blind commitment to security at all costs.” Whilst there was no “smoking gun” in Haneef’s case, regulators pushed the weak criminal case, and even when it failed, invoked immigration law as a counter-terrorism measure. Ultimately, media pressure, alongside recommendations in the

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201 The police affidavit said that Haneef had lived with Sabeel and Kafeel, which was false as Haneef had lived in Liverpool with two other doctors. Further, contrary to the affidavit stating “he had no explanation about having a one-way ticket”, Haneef could explain his journey to Bangalore. See RIX, 2009,p.133.
202 RIX, 2009,p.128-129.
203 Ibid.
204 PICKERING and McCULLOCH, 2010,p.22.
205 This was upheld by the Full Bench of Federal Court (Dec 2007). See Haneef v Minister for Immigration and Citizenship (2007) FCA 1273; Minister for Immigration and Citizenship v Haneef (2007) FCAFC 203.
206 RIX, 2009,p. 142.
208 RIX, 2009, p. 141.
209 LYNCH, 2009.
Clarke Inquiry led to Haneef receiving compensation. However, in a well-functioning democracy, there should not be this piecemeal approach to rights via weak substitutes (such as media reliance). The story may have had a more certain ending with a Bill of Rights, as Haneef could have relied on the courts to enforce his rights. Agents’ incentives would have changed, knowing that this avenue existed, as it would have increased their costs of effort and political costs to deviate.

5.2.2 The Control Order Regime

The next section examines the control order regime. As a civil order which attracts criminal sanctions if breached, regulators may curb an individual’s liberty (considered a physical integrity right) by “side-stepping” criminal procedures.

5.2.2.1 The Australian Case

Enacted by Parliament in only a matter of hours, the Anti-Terrorism Act 2005 (Cth) introduced the control order regime in Australia. This regime imposes restrictions on persons not suspected of a criminal offence that are “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.” Control orders are issued by the court, upon request by the AFP and with written consent by the Attorney-General. These orders can include prohibitions on being at certain places, communicating with certain persons, and obligations such as reporting, wearing tracking devices and remaining at specific premises during certain

210 The Inquiry was led by retired judge John Clarke QC, who had no coercive powers to compel witnesses to testify.
211 Due to thesis restrictions, the aim is not to provide an in-depth analysis, but simply to explain why jurisdictional differences may exist based on the Bill of Rights.
212 TULICH, 2012, p.344.
214 Criminal Code, s.104.4(1)(d).
215 Criminal Code, s.100.1,104.2.
hours. In closed hearings, the suspect is not entitled to be represented by a special advocate, nor would they receive a summary of grounds if an order is issued if it is likely to prejudice national security.

Despite only two control orders issued in Australia, both applications received strong criticism: regulators applied criminal sanctions (without criminal procedural protections) in a “second attempt” to detain unconvicted individuals. The main criticism is that Australia modelled this regime from the UK but did not reproduce corresponding safeguards. This will become evident during comparative analysis, however, the UK approach will be considered next.

5.2.2.2 The UK Case

In contrast, the UK regime was established under the Prevention of Terrorism Act 2005, in response to a court determination that indefinite detention of non-removable, alien terrorist suspects was incompatible with the ECHR. However, following a review into how control orders curtailed rights, the Terrorism Prevention and Investigation Measures Act 2011 (‘TPIM’) replaced them with ‘TPIMs’. Main changes included a non-exhaustive list of measures, and no provisions enabling ECHR-rights derogation.

Under the Act, the Secretary of State applies to the Court for various conditions dealing with terrorism-related activities.

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216 Criminal Code, s.104.5(3).
218 Criminal Code, s.104.2(3)(a),104.5(1)(h),104.5(2A),104.12A(3).
220 For example, Jack Thomas was acquitted, yet the control order was based on the same evidence and conduct as his acquittal. David Hicks’ order was also criticised as he had already served his sentence. See MacDonald and Williams, 2007; Burton and Williams, 2013, p.17.
221 WILLIAMS, 2011, p.1172.
224 TPIM Act s 3; s 6.
Of particular significance is the UK’s “rights-friendly” disclosure scheme, influenced by ECHR case law.\textsuperscript{225} Suspects are guaranteed access to certain levels of information.\textsuperscript{226} Further, there is no absolute bar to disclosure which is prejudicial to national security.\textsuperscript{227} An additional safeguard is the use of special advocates, which represent suspects’ interests in closed proceedings.\textsuperscript{228} These safeguards were influenced by a need to satisfy ECHR proportionality requirements.\textsuperscript{229}

We will now compare jurisdictions and the agency incentives they produce.

\textbf{5.2.2.3 Comparative Analysis}

As the Australian regime is modelled on the UK, there are procedural similarities between the jurisdictions.\textsuperscript{230} Our main focus therefore turns to institutional constraints. The main difference is that the UK is constrained by its Bill of Rights.\textsuperscript{231} This enables judges to guarantee a minimum standard of rights. It has also led to more rights-based litigation, with infringing control orders being revised or revoked.\textsuperscript{232}

What implications does this have on political agents? Applying the contractarian approach, the Bill of Rights acts as a gap-reducing instrument which clarifies agents’ obligations. This makes it an incentive compatibility constraint, which attempts to realign agents’ interests with the principals’ interests of protecting rights. Why? Knowing that they are accountable to a measurable “rights” yardstick, political agents will have less incentive to introduce or apply rights-incompatible law. Any deviation

\textsuperscript{225} Secretary of State for the Home Department v AF [No 3] [2009] 3 WLR 74.
\textsuperscript{226} Criminal Code (Cth) s 104.2(3A).
\textsuperscript{227} WALKER,1995,p.179.
\textsuperscript{228} TPIM Act, sch 4 para 10.
\textsuperscript{229} JENKINS in LENNON and WALKER,2015, ch.18.
\textsuperscript{230} However, WALKER, 2013,p.176-177 states that there are more restrictions on use, lower time limits and a stricter issuance threshold in the UK regime, making it superior.
\textsuperscript{231} Prevention of Terrorism Act 2005 (UK) c 2.
would now result in increased costs of effort (ie, finding loopholes to circumvent the Bill of Rights) and increased political costs (ie, political embarrassment/reduced votes if UK courts issue a declaration of incompatibility in the case of legislators, or determinations of unlawful action in the case of regulators). Thus, it is likely that their utility-maximising preference shifts towards compliance. This position can be further supported in the case of legislators. The Independent Reviewer of Terrorism, who provides annual reports to Parliament on TPIMs, made ten recommendations to promote human rights in 2014, the majority of which were statutorily implemented.  

In contrast, Australia has no Bill of Rights, is not bound by the ECHR and has not implemented international treaty obligations. Further, its common law right to liberty is not a strong protection as it can be abrogated by statute. For instance, Australian control orders can encroach upon liberty (eg, imposing 18 hour curfews) whereas TPIMs cannot. Absent the Bill of Rights, this leads to a poor translation of the UK regime, as there is no minimum guarantee of developing and applying rights-consistent laws.

Against this backdrop of weak substitutes, Australia has taken a remarkably different approach. Judicial deference to Parliament remains a common theme, with the High Court focusing on constitutional questions and rejecting rights arguments. This is demonstrated through the most significant case which challenged the control order regime, Thomas v Mowbray. The case was not based on infringing rights, but whether...

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233 INDEPENDENT REVIEWER OF TERRORISM, 2015. Further, he/she must replicate the Home Secretary’s position in each TPIM initiation to determine whether the same outcome would have been reached. In Australia the Independent Monitor conducts one-off reviews and is not compelled to review individual cases. This provides for ad hoc, patchy oversight. See WALKER,1995, p.182.

234 Article 9 provides the right to liberty. BURTON and WILLIAMS,2013,p.4.

235 Ibid.


237 “Human rights concerns not could play a decisive role…and cannot be taken into account in deciding whether or not to make a control order.” See WALKER,1995,p.181.

lawful scopes of federal and judicial power had been exercised.\(^{239}\) The judgement barely contained any reference to rights, with the court finding that the regime did not infringe upon the separation of powers.\(^{240}\)

How will this affect political agents’ incentives? Here, there are fewer constraints in the social contract, meaning that there is more scope for deviation. Knowing that their decisions are subject to minimal judicial review with no focus on rights, agents tend to favour counter-terrorism measures, potentially to the detriment of rights. This is heightened when minority rights are concerned, as regulators know that this translates to lower votes. As there is no incentive to align principal-agent interests, there is a danger that Australia’s regime can single out people in a more biased manner. To change the outcome, we must look to the rule. A Bill of Rights, which encouraged the UK’s rights-based jurisprudence and legislative reform, is an appropriate incentive compatibility constraint. It creates incentives to proportionally balance counter-terrorism and rights by increasing agents’ costs of deviating.

6. Conclusion

In our quest to locate a rule which achieves a proportionate response in counter-terrorism and fundamental rights, can a Bill of Rights produce incentive constraints for regulators to act within their scope of power? Our Law and Economics analysis concurs. Through a Public Choice perspective, we have seen how arbitrary state action in the counter-terrorism context is fuelled by limited checks and balances (“weak substitutes”) in Australia, as compared to the UK. Courts play a more limited role due to parliamentary supremacy; knowing this, there is a tendency for political agents to

\(^{239}\) McGARRITY and WILLIAMS, 2010,p.57.
\(^{240}\) ROACH, 2015,p.673; Similarly in Jack Thomas’ case, the High Court could not consider whether secret intelligence denied Thomas a fair hearing (contrary to an ECHR-rights approach), but rather, whether control orders transferred non-judicial powers to courts (constitutional/separation of powers approach). See BURTON and WILLIAMS,2013,p.22.
expand counter-terrorism to the detriment of fundamental rights, given professional biases. As has been shown, physical integrity rights, as minority rights, are adversely affected at the margin. How then, can we improve the institutional design of rules to achieve better outcomes?

The policy recommendation for Australia is to introduce robust rules for rulers (the Bill of Rights) to construct a better outcome (safeguarding rights). Hence, the Bill of Rights can solve the principal-agent problem by creating adequate incentive constraints which alter agents’ payoff structures, realigning principal-agent interests. From a contractarian perspective, it acts as a gap-reducing instrument in the social contract, clarifying regulators’ obligations towards rights and leaving less room for “bad” decision-making. What this means is that agents’ costs of effort and political costs for deviating are increased, so that it is *more likely* that the utility-maximising preference is to comply with rights (as the Bill of Rights is not an absolute, but additional constraint). This is particularly important in protecting minority rights against the “tyranny of the majority.”

In practice, Australia’s stoic commitment to parliamentary sovereignty means that a statutory Bill of Rights would serve its interests best. Whilst this would not provide the strongest safeguard like constitutional entrenchment, it would still elevate the role of judges as protectors of rights. This impacts political decision-making incentives.

Australian exceptionalism may no longer be justified. The fact that all other liberal democracies have a Bill of Rights might support the existence of a global “efficiency norm.” Some scholars have argued that Australia is already converging towards this

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241 Future research could look at counter-terrorism/rights effects on majority/minority rights based on State and Territory Bills of Rights, and/or states with constitutional courts.
position, given two of its local jurisdictions have Bills of Rights (with others proposed) and its HRA is a “stepping stone” towards a Bill of Rights. Others contend that Australia is moving towards a “pre-HRA UK [situation]”, as litigants are seeking recourse via international rights treaties (due to weak domestic substitutes), and Australian judges are increasingly incorporating international law principles domestically.\footnote{DAVIS and WILLIAMS, 2002, p.18.} It may well be a matter of “watch this space”.

\footnote{DAVIS and WILLIAMS, 2002, p.18.}
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