

IS THERE A COMMON LAW ‘RIGHT’ TO FREEDOM OF SPEECH?

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The recognition of political speech as a constitutional principle and the emergence of the principle of legality have driven the doctrinal evolution of freedom of speech at common law. The High Court now treats freedom of speech as something more than a residual liberty. Yet this doctrinal and taxonomic transformation is not complete. This article posits that at some point the High Court may incorporate proportionality into the methodology of common law rights protection. That development would be problematic, but the forces driving it may well be inexorable. However, the article concludes that there is an alternative. The High Court has an opportunity (if so minded) to develop a distinctive, indigenous conception of freedom of speech at common law.

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I INTRODUCTION

It may seem an odd, if not anachronistic, thing to ask whether there is a ‘right’ to freedom of speech at common law. Surely in our age of statutes and human rights the answer is an unqualified ‘yes’. With the continued expansion in the size and complexity of the statute book, our judges are more alive than ever to the threat this poses to fundamental rights, including free speech.¹ The pressing nature of that threat was outlined in painstaking detail in the recent 600-page report of the Australian Law Reform Commission on *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*.² Indeed, a chapter of nearly 50 pages was devoted to freedom of speech.³ Its opening summary noted that, amongst other things, the chapter ‘discusses the source and rationale of the common law right of freedom of speech’.⁴ And significantly, the interpretive approaches of our courts was said by then Chief Justice Spigelman to have established a ‘common law bill of rights’ which included freedom of speech.⁵

These contemporary observations seem to assume, if not require, the existence of a common law ‘right’ to freedom of speech. Yet the orthodox view at common law is that freedom of speech is not a ‘right’ but a residual liberty — that in the event of government or legislative action infringing the freedom of speech of an individual, that breach is not directly actionable. Part II will outline this position and explore the nature of a common law ‘right’ to freedom of speech.

There are, however, contemporary developments in Australia and throughout the common law world which have put pressure on the common law’s residual conception of freedom of speech. These developments will be the focus of Part III. In Australia, for example, it will be argued that the recognition of political speech as a constitutional principle and the emergence of the principle of legality have driven the doctrinal evolution of freedom of speech at common law.

¹ See, eg, Steven Rares, ‘Legality, Rights and Statutory Interpretation’ (Speech, 2013 AGS Administrative Law Conference, 20–21 June 2013) [2] <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-raises/rares-j-20130620>>, archived at <<https://perma.cc/3JZP-7HJP>>.

² Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015).

³ *Ibid* ch 4.

⁴ *Ibid* 77.

⁵ Chief Justice James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 4.

The equivalence proposition is considered in Part IV. This is where judges (in both Australia and the United Kingdom) have asserted that the common law provides equivalent protection to freedom of speech as the relevant articles in international human rights treaties such as the *International Covenant on Civil and Political Rights* ('ICCPR')⁶ and the *European Convention on Human Rights* ('ECHR').⁷ That important doctrinal and methodological claim will be unpacked and critiqued. Part V will suggest that at some point the High Court may well adopt the equivalence proposition. Whilst such a development would be problematic in my view, the doctrinal and normative forces driving it may well be inexorable.

Finally, Part VI considers whether there is an alternative at common law to recognising the equivalence proposition (and proportionality) in order to outline the protection it provides to freedom of speech. It is suggested that an opportunity exists for the High Court to develop a distinctive, indigenous conception of freedom of speech at common law.

II WHAT IS THE NATURE OF A 'RIGHT' TO FREEDOM OF SPEECH?

Sir Gerard Brennan made the following observation in his foreword to Michael Chesterman's *Freedom of Speech in Australian Law: A Delicate Plant*,⁸ which was published in 2000:

There is no common law right to free speech which trumps other legal rights but there is a general freedom of speech because of the common law principle that 'everybody is free to do anything, subject only to the provisions of the law'. The freedom recognized by the common law is confined only by limitations imposed by statute or by other rules of the common law that seek to protect the common good or those personal interests to which the common law accords priority.⁹

This posits freedom of speech not as a 'right' but as one aspect of a residual liberty which exists once the scope of the general law and statute is ascertained. And that is precisely what the unanimous High Court appeared to

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR').

⁸ Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000).

⁹ *Ibid* vii (citations omitted).

have in mind in *Lange v Australian Broadcasting Corporation* ('Lange'),¹⁰ which is the source of the internal quote in Brennan's statement above. The full quote is worth outlining as it confirms the Brennan account that '[t]here is no common law right to free speech'; and it was made in a decision where the High Court emphatically confirmed the existence of a constitutional freedom of political speech:

Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.¹¹

This conception of speech as residual liberty is said to *arise* '[u]nder a legal system based on the common law'. That is important. It is, for example, consistent with Dicey's account of the English Constitution and the status or location of freedom of speech within it, of which he tartly observed: 'Freedom of discussion is ... in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written.'¹² It also accords with the notion that a legal 'right' in a common law system is something which an *individual* possesses and which may be vindicated or protected by the provision of a remedy in the event of infringement.¹³ For example, at common law a person has a 'right' to exclude others from their property which, in the event of breach, may be vindicated by an action in tort for trespass.¹⁴ And personal liberty is a common law 'right' the infringement of which may be remedied by the writ of habeas corpus or found an action in false imprisonment.¹⁵ In this regard, there is no 'right' to freedom of speech at common law.¹⁶

In Australia, the closest one gets to such a position is an implied freedom case where there is coextensive protection of *political* speech at common law

¹⁰ (1997) 189 CLR 520 ('Lange').

¹¹ *Ibid* 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted).

¹² AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1964) 246.

¹³ See Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 18–19; Justice WMC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79(3) *Australian Law Journal* 167, 176–7.

¹⁴ *Wuta-Ofei v Danquah* [1961] 1 WLR 1238, 1243 (Lord Guest) (Privy Council).

¹⁵ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *New South Wales v TD* (2013) 83 NSWLR 566, 578 [50]–[51], 579 [53] (Basten JA).

¹⁶ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48 (Brennan J) ('*Nationwide News*').

and under the *Constitution*.¹⁷ However, that 'right' is not a personal one and it is not vindicated by an action at common law. It is rather a freedom to communicate on political matters which is protected by limiting legislative and executive power to the extent necessary to facilitate our constitutional system of representative and responsible government.¹⁸ Indeed, such is the willingness of the High Court to emphasise the non-personal nature of the right under implied freedom, that the first part of the relevant test of validity was stated and explained in the following terms in *Unions NSW v New South Wales*:¹⁹

The first question posed by *Lange* is whether [the law] effectively burdens the freedom of political communication either in its terms, operation or effect. It requires consideration as to how the section [in question] affects the freedom generally ... In addressing this question, it is important to bear in mind that what the *Constitution* protects is not a personal right ... The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. *Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally.* The central question is: how does the impugned law affect the freedom?²⁰

There is some awkwardness — if not abstraction — with the italicised proposition above. Yet it is said to follow from the correctness of Brennan J's observation in *Australian Capital Television Pty Ltd v Commonwealth* ('ACTV')²¹ that 'the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation'.²² Even so, this proposition is of little practical significance for the operation of the implied freedom, as courts now consider *any* infringement of political communication to meet the 'effective burden'

¹⁷ See *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 68 [152] (Heydon J) ('*City of Adelaide*').

¹⁸ *Lange* (n 10) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁹ (2013) 252 CLR 530 ('*Unions NSW*').

²⁰ *Ibid* 553–4 [35]–[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added) (citations omitted).

²¹ (1992) 177 CLR 106 ('ACTV').

²² *Ibid* 150, cited in *McCloy v New South Wales* (2015) 257 CLR 178, 202–3 [30] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

threshold.²³ But Brennan J's characterisation of what would be judicially required *if* the implied freedom was a personal right is, arguably, of relevance to its status at common law, as will be detailed below.²⁴

In any event, it seems clear enough that in Australia freedom of speech is not a common law 'right', in the sense of being held by an individual, which is directly actionable in the courts, and enforced through the provision of a remedy in the event of its breach.²⁵ Yet as John J Doyle QC observed in a valuable paper on 'Common Law Rights and Democratic Rights', '[f]or a term so frequently used, the meaning of "common law rights" is surprisingly unclear.'²⁶ And he rightly notes the different ways in which the descriptor of 'rights' has come to be used in common law discourse. Relevantly, 'a reference to common law rights is a reference to a very loose legal category. It ranges over enforceable rights, residual freedoms or immunities, privileges and principles which underlie a particular area of the law.'²⁷ For example, the right to a fair trial is in fact 'a principle which may manifest itself in a range of [common law] rules.'²⁸ And Doyle suggests that '[i]t makes sense to talk of a right to personal integrity, because the law of torts confers remedies for interference with that right.'²⁹ But importantly, he adds the taxonomic qualification that '[a]s long as we recognise the loose sense in which "right" is then used, no harm is done.'³⁰ As for freedom of speech:

Many other things that we call common law rights are not enforceable rights even in that loose or indirect sense. The common law right of freedom of speech is a reference to the residual area of freedom which remains after allowing for the impact of common law legal rules such as those relating to defamation and contempt of court and then any legislation which impinges on freedom of speech. There is no enforceable right to freedom of speech. The refer-

²³ See, eg, *Unions NSW* (n 19) 554 [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Monis v The Queen* (2013) 249 CLR 92, 143–4 [113]–[116], 145 [119]–[120] (Hayne J) ('*Monis*').

²⁴ See Part III(B)(2) below.

²⁵ *Brown v Classification Review Board of the Office of Film & Literature Classification* (1998) 82 FCR 225, 235 (French J) ('*Brown*').

²⁶ JJ Doyle, 'Common Law Rights and Democratic Rights' in PD Finn (ed), *Essays on Law and Government: Principles and Values* (Lawbook, 1995) vol 1, 144, 147.

²⁷ *Ibid* 148.

²⁸ *Ibid*.

²⁹ *Ibid* 147.

³⁰ *Ibid*.

ence is to an immunity from restraint — an immunity after allowing for the impact of common law and statutory rules.³¹

This account is consistent with the judicial and extra-curial observations of Justice Brennan noted above. And, I would suggest, it represents the orthodox taxonomic and doctrinal account of the status of freedom of speech at common law in Australia (and New Zealand and the UK as well), at least until the 1990s.

III THE DOCTRINAL EVOLUTION OF FREEDOM OF SPEECH AT COMMON LAW

Professor Paul Rishworth has offered the following conception of 'rights' at common law. It was provided to explain the (common law) rights landscape that pertained when the *New Zealand Bill of Rights Act 1990* (NZ) was enacted, and to demonstrate the significant impact this development had on judicial (rights) reasoning and New Zealand public law more generally:

There had always been a set of rights to which lawyers and others had frequent regard. They were called 'common law rights' ... However, the scope of common law rights seldom required detailed specification. There was no clear standard for determining what counted as a permitted abridgement, nor any necessary role for judges in assessing that standard. Parliament decided such questions, and to that arrangement we gave the name 'parliamentary supremacy'. It was not uncommon to have recourse to rights in legal argument, but they functioned more as broad aspirations. A case in which, say, freedom of expression was advanced in order to influence a statutory meaning would probably not ascend to the level of sophistication (assessment of objective, rationality, proportionality, and so on) as is common in North American constitutional adjudication. Common law rights were conceptions of generally desirable outcomes, not a tool for defining a baseline of acceptable law and conduct for government. That latter conception may have been appropriate for countries with supreme law constitutions.³²

In the 1990s, in Australia, New Zealand, and the UK, this residual conception of the common law 'right' to freedom of speech came under pressure.

³¹ Ibid 148.

³² Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights' (2004) 15(2) *Public Law Review* 103, 106–7.

A United Kingdom

The watershed in the United Kingdom was the ‘the growing influence of the *European Convention on Human Rights and Fundamental Freedoms*’.³³ As Eric Barendt observed in 1994:

After the ... decision of the House of Lords in the *Derbyshire* libel case, freedom of speech may be regarded as a principle of English law, that is, as a standard which the courts must take into account when developing the common law or in interpreting statutes.³⁴

In *Derbyshire County Council v Times Newspapers* (*‘Derbyshire’*),³⁵ the Court of Appeal said it must consider the *ECHR* when the common law was unclear. It did so to hold that a public authority cannot bring a common law action in defamation as to do so would offend the guarantee of freedom of expression in art 10 of the *ECHR*.³⁶

Yet it was the earlier decision of the House of Lords in *Attorney-General v Guardian Newspapers Ltd [No 2]*³⁷ which suggested that the English common law no longer ‘treat[ed] freedom of speech as a merely residual liberty’.³⁸ The case was part of the *Spycatcher* litigation.³⁹ Ultimately, the House of Lords lifted a number of injunctions that had restrained publication of a former MI5 agent’s memoir which detailed activities of the UK security services.⁴⁰ In the course of doing so, Lord Goff outlined an enhanced — and more substantive — conception of the ‘right’ to freedom of speech at common law:

I wish to observe that I can see no inconsistency between English law on this subject and article 10 of the *European Convention on Human Rights* ... I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty. The exercise of the

³³ Eric Barendt, ‘Free Speech in Australia: A Comparative Perspective’ (1994) 16(2) *Sydney Law Review* 149, 150.

³⁴ *Ibid* (citations omitted).

³⁵ [1993] AC 534 (*‘Derbyshire’*).

³⁶ *Ibid* 550 (Lord Keith).

³⁷ [1990] 1 AC 109 (*‘Guardian Newspapers’*).

³⁸ Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) 41. See also *ibid* 283, where Lord Goff stated: ‘I wish to observe that I can see no inconsistency between English law on this subject and article 10 of the *European Convention on Human Rights*’.

³⁹ See generally Eric Barendt, ‘*Spycatcher* and Freedom of Speech’ [1989] (Summer) *Public Law* 204.

⁴⁰ *Guardian Newspapers* (n 37) 264 (Lord Keith), 267 (Lord Brightman), 276 (Lord Griffiths), 293 (Lord Goff), 293 (Lord Jauncey).

right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include 'the interests of national security' and 'preventing the disclosure of information received in confidence.' It is established in the jurisprudence of the European Court of Human Rights that the word 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. I have no reason to believe that English law, as applied in the courts, leads to any different conclusion.⁴¹

The significance of this apparent doctrinal shift is that, analytically speaking, one *begins* with freedom of speech if it is a common law principle or standard — like art 10 of the *ECHR* — which courts, then, use to inform the interpretation of statutes and to assess the compatibility (or otherwise) of their own body of rules and the actions of government and the legislature. The common law 'right' to freedom of speech, then, begins to more closely resemble a 'baseline of acceptable law and conduct for government.'⁴² In this way, we can see freedom of speech at common law morphing from a residual liberty into something which begins to approximate a substantive right with a core content. Indeed, it *must* do so. The sort of (rights) analysis courts now seek to undertake — to inform the interpretation of statutes and to assess the free speech compatibility (or otherwise) of their own body of rules and government action — can only be performed, logically, if they first articulate the core content of that freedom of speech principle or standard.

In his seminal article 'The Infiltration of a Bill of Rights', Lord Browne-Wilkinson endorsed the proposition regarding the substantive doctrinal equivalence of the right to freedom of speech under English common law and art 10 of the *ECHR*.⁴³ At the time of writing (1992), the *ECHR* did not form part of English domestic law, and it was Lord Browne-Wilkinson's view that, as a consequence of those urging that it should, 'attention has been diverted from the principles of our indigenous common law',⁴⁴ and, relevantly, that if what we now recognise as the principle of legality was robustly applied to general statutory powers, 'for most practical purposes the common law would provide protection to the individual at least equal to that provided by the

⁴¹ *Ibid* 283–4 (Lord Goff).

⁴² Rishworth (n 32) 106.

⁴³ Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] (Autumn) *Public Law* 397, 405.

⁴⁴ *Ibid* 404.

ECHR.⁴⁵ It was, however, the House of Lords decision in *Reynolds v Times Newspapers Ltd*⁴⁶ which represented the (pre-*Human Rights Act*) apogee for common law freedom of speech. Lord Steyn, for example, described freedom of speech at common law in the following manner:

[T]here is a constitutional right to freedom of expression in England ... By categorising this basic and fundamental right as a constitutional right its higher normative force is emphasised. These are perhaps some of the considerations which enabled Lord Goff in 1988 and Lord Keith in 1993 to hold that article 10 of the Convention and the English law on the point are in material respects the same.⁴⁷

In any event, the English judicial insistence that its common law matched — if not trumped — the rights protection offered by the *ECHR* was less important (and less problematic) once the latter was formally incorporated into domestic law when the *Human Rights Act 1998* (UK) ('*HRA*') was enacted. This completed the evolution of freedom of speech from a residual liberty (at common law) to a principle or standard (of common law informed by the *ECHR*) to a substantive right (an *ECHR* article incorporated into domestic law by statute). Whilst the protection offered to freedom of speech at common law was not displaced,⁴⁸ the right under the *HRA* is expressly outlined (art 10.1) and is subject to proportionate legal restrictions (art 10.2). It is also a right with a core content sourced from the extensive jurisprudence of the European Court of Human Rights and the European Human Rights Commission,⁴⁹ and supplemented by the decisions of courts in the United Kingdom. Moreover, and in contradistinction to the situation at common law, the right to freedom of expression under the *HRA* is directly actionable.⁵⁰ It is a personal right. If a court, then, finds that a public authority has acted incompatibly with a

⁴⁵ Ibid 408.

⁴⁶ [2001] 2 AC 127.

⁴⁷ Ibid 207 (citations omitted).

⁴⁸ *Human Rights Act 1998* (UK) s 11 ('*HRA*'). See also Eric Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84(3) *Indiana Law Journal* 851, 852–5.

⁴⁹ See generally Registry of the European Court of Human Rights and Council of Europe's Directorate General of Human Rights, *Freedom of Expression in Europe: Case-Law concerning Article 10 of the European Convention on Human Rights*, ed Mario Oetheimer (Council of Europe Publishing, 2007).

⁵⁰ *HRA* (n 48) s 7.

person's freedom of expression, it 'may grant such relief or remedy ... as it considers just and appropriate'.⁵¹

Jason Varuhas has rightly observed that this important statutory development provided a 'pressure release' from the problematic doctrinal and taxonomic developments at common law:⁵²

[T]he overall effect of the [HRA] on the common law was to kill the momentum built up during the previous decade to reorient common law doctrines towards rights. Given Convention rights were now directly actionable pursuant to a statutory action a core motivation for so developing the common law fell away.⁵³

Yet the common law is again on the rise in the field of rights in the United Kingdom. The constitutional upheaval occasioned by the Brexit referendum result and the possibility that the *HRA* may be repealed appear to be the drivers of a 'resurgent judicial interest in developing the common law along rights-based lines'.⁵⁴ The recent jurisprudence of the UK Supreme Court has consciously turned towards indigenous common law⁵⁵ — and the development of the principle of legality specifically — to fill any lacuna in fundamental rights protection which the repeal of the *HRA* would occasion.⁵⁶ Interestingly, and as a consequence, it appears that courts in the United Kingdom and Australia are now faced with similar doctrinal and taxonomic rights issues at common law. For example, what role (if any) does proportionality play in the methodology of common law rights protection?

⁵¹ *Ibid* s 8(1).

⁵² Jason NE Varuhas, 'Administrative Law and Rights in the UK House of Lords and Supreme Court' in Paul Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press, 2019) 225, 226.

⁵³ *Ibid* 255.

⁵⁴ *Ibid* 263.

⁵⁵ Scott Stephenson, 'The Supreme Court's Renewed Interest in Autochthonous Constitutionalism' [2015] (July) *Public Law* 394.

⁵⁶ See, eg, *Kennedy v Charity Commission* [2015] AC 455, where Lord Mance (with whom Lord Neuberger and Lord Clarke agreed) expressly endorsed the equivalence proposition in the context of freedom of speech and art 10 of the *ECHR*, which had emerged in both *Guardian Newspapers* (n 37) and *Derbyshire* (n 35), and stated: 'In some areas the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence ... *And in time, of course, a synthesis may emerge*': at 504 [46] (emphasis added). See also Varuhas (n 52) 264–86.

B Australia

A similar doctrinal trajectory for freedom of speech at common law is evident in Australia. The contemporary jurisprudence of our senior appellate courts suggests that free speech is no longer a residual liberty but a principle with independent weight. The domestic drivers of this development are twofold in my view. The first is indigenous constitutional law — initially in the context of characterisation and then in the High Court’s derivation of the implied freedom of political communication.⁵⁷ The second is the emergence of the common law principle of legality as a strong clear statement rule for fundamental rights.⁵⁸

1 Constitutional Law

The recognition of freedom of speech (especially on government and political matters) as a constitutional principle was an epochal moment in Australian law. In terms of triggering a judicial reimagining of free speech doctrine, it is our equivalent to the *ECHR* in the United Kingdom and the *ICCPR* in New Zealand. In *Davis v Commonwealth*,⁵⁹ for example, the High Court held invalid a statutory provision that sought to limit and control the public use of certain common words and phrases in connection with the celebration of European settlement in Australia.⁶⁰ The provision was not supported by the incidental legislative power, as the joint judgment of Mason CJ, Deane and Gaudron JJ explained: “This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.”⁶¹ This injection of freedom of speech into constitutional discourse was concretised when in 1992 the High Court derived the implied right to freedom of political communication.⁶²

The implied freedom is not an individual constitutional right, as noted above, yet there *must* be an ascertainable core content to facilitate the judicial evaluation of the compatibility of executive and legislative action with the principle. The logic of that analysis requires that we *begin* with freedom of

⁵⁷ See Adrienne Stone, ‘Expression’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 952, 954–6.

⁵⁸ Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36(3) *Sydney Law Review* 413.

⁵⁹ (1988) 166 CLR 79.

⁶⁰ *Ibid* 88–91 (Mason CJ, Deane and Gaudron JJ).

⁶¹ *Ibid* 100.

⁶² *Nationwide News* (n 16); *ACTV* (n 21).

political speech — this is required when (political) speech is recognised as a constitutional principle. The broad (and necessary) scope of the right's content was provided to some extent in *Theophanous v The Herald & Weekly Times Ltd* ('*Theophanous*'),⁶³ when the joint judgment of Mason CJ, Toohey and Gaudron JJ defined 'political discussion' to include

discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choices.⁶⁴

The joint judgment illustrated the final point above by reference to Barendt's view that "political speech" refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.⁶⁵ In *Lange*, however, the Court suggested that only communications with the capacity to influence *federal* voting choices would attract constitutional protection under the implied freedom.⁶⁶ Even so, a narrow view of those subject matters should not be taken.⁶⁷ And to that end, the High Court in later cases has said that 'political communication' which *prima facie* attracts constitutional protection includes non-verbal conduct,⁶⁸ and extends to 'false, unreasoned and emotional communications',⁶⁹ and that '[i]nsults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism'.⁷⁰

This line of cases suggests that our constitutional conception of 'political communication' is broad, robust, and remains open. That is important for present purposes. It provides substantive content to the constitutional principle of 'political speech' which, presumably, lies also at the core of the speech protected by the common law. Yet that content cannot exhaust the

⁶³ (1994) 182 CLR 104 ('*Theophanous*').

⁶⁴ *Ibid* 124.

⁶⁵ *Ibid*, quoting Eric Barendt, *Freedom of Speech* (Clarendon Press, 1985) 152.

⁶⁶ *Lange* (n 10) 560–1 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). My thanks to one of the referees for this point.

⁶⁷ *Ibid* 570–1.

⁶⁸ *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ) ('*Levy*').

⁶⁹ *Ibid* 623 (McHugh J).

⁷⁰ *Coleman v Power* (2004) 220 CLR 1, 45 [81] (McHugh J) ('*Coleman*').

scope of freedom of speech protected by the common law. As Heydon J observed in *Attorney-General (SA) v Adelaide City Corporation* ('*City of Adelaide*');

The common law right of free speech which the principle of legality protects is significantly wider, incidentally, than the constitutional limitation on the power to enact laws burdening communications on government and political matters.⁷¹

This point will be considered further below.⁷²

In any event, this heightened constitutional sensitivity to freedom of (political) speech would inevitably bleed into common law doctrine. This occurred soon after the derivation of the implied freedom. In *Ballina Shire Council v Ringland*,⁷³ the New South Wales Court of Appeal held that a local government authority could not maintain an action in defamation. In doing so, the Court endorsed the reasoning (and result) of the House of Lords decision in *Derbyshire*,⁷⁴ and held that the common law of Australia would now incorporate this rule.⁷⁵ It was, however, our new constitutional principle of 'political speech' and its compatibility with art 19 of the *ICCPR* (to which Australia is a party) which reinforced 'the persuasive effect of the decision in the *Derbyshire* case'.⁷⁶ The unanimous decision of the High Court in *Lange* formalised this symbiotic relationship when it said that '[o]f necessity, the common law must conform with the *Constitution*'.⁷⁷

2 Common Law Principle of Legality

The second dynamic which has driven the morphing of freedom of speech at common law from a residual liberty into a principle with intrinsic and independent weight is the principle of legality. The reinvigoration and extension of this interpretive rights principle is a striking development in contemporary Australian law.⁷⁸ It will be explained why the manner in which this is being undertaken requires some judicial elaboration as to the core

⁷¹ *City of Adelaide* (n 17) 68 [152].

⁷² See below 285–7.

⁷³ (1994) 33 NSWLR 680 ('*Ballina Shire Council*').

⁷⁴ *Ibid* 688 (Gleeson CJ).

⁷⁵ *Ibid* 691.

⁷⁶ *Ibid* 688.

⁷⁷ *Lange* (n 10) 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁷⁸ Dan Meagher, 'The Principle of Legality and a Common Law Bill of Rights: Clear Statement Rules Head Down Under' (2016) 42(1) *Brooklyn Journal of International Law* 65.

content of the common law 'right' to freedom of speech — at present this kind of definitional analysis is largely platitudinal and case-specific at best. On the one hand, this is perfectly understandable: the very essence of common law method is its incremental, inductive, and case-specific nature. On the other, it is not sufficient when the justification for and application of the principle of legality is said to protect a common law 'right' to freedom of speech in a substantive sense.

It might of course be suggested that contemporary judicial descriptions of freedom of speech as a common law 'right' for purposes of the principle of legality is, again, simply 'a reference to a very loose legal category'.⁷⁹ That is, it signifies nothing more than the idea that speech is an important common law value that ought to be protected if possible when statutes are interpreted and applied. The 1998 decision of the Federal Court in *Brown v Classification Review Board of the Office of Film and Literature Classification* ('Brown') supports this more traditional account. French J explained it in the following terms:

The common law does not provide the support for freedom of expression that would accord it the status of a 'right'. In Australia 'at common law there is no right to free discussion of government. Freedoms or immunities recognised by the common law are, generally speaking, liable to impairment or abrogation by legislation' ... At best it can be said that, absent constitutional implication, the common law and conservative rules of construction provide a zone of partial protection. The overarching principle remains in effect that 'where Liberty ends the Law begins and where the Law ends Liberty begins'.⁸⁰

This account still posits freedom of speech at common law as a residual liberty. It is the zone of expressive freedom that remains once the proper scope and operation of the general law and statute is determined. Yet the manner in which the principle of legality has developed since *Brown* and the contemporary justification offered by the High Court for its application has shifted the doctrinal and taxonomic ground. The principle is no longer an interpretive presumption that seeks to honour authentic notions of legislative intention.⁸¹

⁷⁹ Doyle (n 26) 148.

⁸⁰ *Brown* (n 25) 235, quoting *Nationwide News* (n 17) 48 (Brennan J), Albert Kocourek, 'The Alphabet of Legal Relations' (1923) 9(4) *American Bar Association Journal* 237, 237.

⁸¹ See *Potter v Minahan* (1908) 7 CLR 277, which suggested that the original normative justification for applying (what became known as) the principle of legality was to ascertain the meaning of legislation as intended by the enacting Parliament: at 304 (O'Connor J). See

The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.⁸²

In terms of how the principle of legality is applied, and just as importantly why, the High Court has said:

What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.⁸³

In doing so, the Court has emphasised that the essence of the principle of legality is that Parliament must consider and then consciously decide whether its legislation is to infringe a fundamental right, freedom, or principle at common law. The principle can, then, play a salutary role when judges give legislators prior notice of the common law (rights) backdrop against which their legislation will be construed. This may improve the clarity and rights sensitivity of legislation, promoting democracy and rule of law values in the process.

However, this conception of the principle of legality and its application requires that Parliament has clear and prior notice as to the *content* of the fundamental common law rights, freedoms, and principles. If, for example, Parliament wishes to legislate to ensure that members of the public can freely use and peacefully enjoy public spaces, it needs to ascertain to what extent it may limit the freedom of speech of others, which is otherwise protected by the common law (and the *Constitution*), in order to do so.⁸⁴ That legislative decision on rights can only be made in accordance with the principle of

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

⁸² *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

⁸³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ), citing *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) ('Coco'), quoting *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman).

⁸⁴ See *Coleman* (n 70).

legality if Parliament knows in advance the content of the 'right' to freedom of speech at common law. As noted, the High Court has indicated this content when a statute implicates the constitutional principle of 'political' speech.⁸⁵ Yet even in cases concerning the implied freedom, the Court is not absolved of this common law (free speech) issue. That is so because the relevant statute must first be construed — which involves the application of the principles of statutory interpretation including the common law principle of legality — before the Court can turn to the constitutional point.⁸⁶

In *Coleman v Power* ('*Coleman*'), for example, the High Court considered a statutory provision which made it an offence to use threatening, abusive, or insulting words in public.⁸⁷ In interpreting that provision, Gummow and Hayne JJ made the following observations about speech and the manner in which it is protected at common law:

The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.⁸⁸

...

Once it is recognised that fundamental rights are not to be cut down save by clear words, it follows that the curtailment of free speech by legislation directed to proscribing particular kinds of utterances in public will often be read as 'narrowly limited'.⁸⁹

It might be said that these statements are perfectly consistent with the orthodox account of free speech as a residual liberty at common law. But I am not sure that is correct. Freedom of speech is 'not absolute', but it is something more than simply what is 'left over' in this context. It appears to have some independent weight, which is doing important analytical work. That may necessarily follow in cases like *Coleman* where the relevant speech at issue is 'political' in the constitutional sense. Relevantly, the content of (political) speech protected at common law and under the *Constitution* (pursuant to the implied freedom) is coextensive. In those cases where the implied freedom is

⁸⁵ See, eg, *Theophanous* (n 63) 124 (Mason CJ, Toohey and Gaudron JJ).

⁸⁶ See *Coleman* (n 70) 21 [3] (Gleeson CJ), 36–41 [49]–[68] (McHugh J), 68–77 [159]–[193] (Gummow and Hayne JJ), 80–1 [207] (Kirby J), 115–19 [306]–[316] (Heydon J).

⁸⁷ *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d).

⁸⁸ *Coleman* (n 70) 75 [185] (citations omitted).

⁸⁹ *Ibid* 76 [188].

engaged there is, then, a ‘right’ to freedom of speech at common law which has a core and ascertainable content.

Moreover, that ‘right’ is arguably a personal one which may be vindicated by an interpretive remedy at common law — the application of the principle of legality. This was possible for Gummow and Hayne JJ in *Coleman* by giving the offence a narrow construction which was open on the text and consistent with its statutory purpose.⁹⁰ And as the content of the common law ‘right’ to freedom of speech is knowable by Parliament in these (constitutional) contexts, the application of the principle of legality is consistent with its contemporary normative justification.

The doctrinal and taxonomic treatment of freedom of speech at common law as something considerably more than residual liberty is supported by recent High Court jurisprudence. For example, in *City of Adelaide* (another implied freedom case), French CJ detailed the considerable analytical work it performs:

The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories. However, through the principle of legality, and criteria of reasonable proportionality, applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.⁹¹

The analysis undertaken in this range of interpretive contexts can only be undertaken, I would argue, if freedom of speech at common law has a substantive content. This account was confirmed by French CJ in later implied freedom cases such as *Monis v The Queen* (‘*Monis*’)⁹² and *Tajjour v New South Wales* (‘*Tajjour*’).⁹³ In *Tajjour*, for example, his Honour made the following observations:

[F]reedom of speech has long enjoyed special recognition at common law and particularly so in relation to the criticism of public bodies. As TRS Allan wrote

⁹⁰ Ibid 74–5 [182]–[183], 78–9 [198]–[199].

⁹¹ *City of Adelaide* (n 17) 32 [44] (citations omitted).

⁹² *Monis* (n 23) 128 [60].

⁹³ (2014) 254 CLR 508, 545–6 [28] (‘*Tajjour*’).

in 1996: 'The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.' Even absent entrenchment by express or implied constitutional guarantee, freedom of speech on public affairs at common law is more than a particular application of the general principle that anybody is free to do anything which is not forbidden by law. In order to displace it, the Parliament must have chosen clear language which permits no other outcome.⁹⁴

Yet the task of defining the scope of freedom of speech at common law is straightforward in these implied freedom cases. As noted, and by definition, the content of (political) speech protected at common law and under the *Constitution* is coextensive. The situation is less clear in non-political free speech cases. What is the scope of freedom of speech protected at common law more generally? Logically, it must be wider than just political expression, as Heydon J noted in *City of Adelaide*.⁹⁵ Yet to the best of my knowledge there are few senior appellate court decisions in Australia which undertake any detailed common law free speech exegesis of this kind. That is not surprising due to the traditional account of freedom of speech as a residual liberty and the more recent analytical consideration of speech through the constitutional lens of the implied freedom. But it must be undertaken if freedom of speech at common law has an 'independent and intrinsic weight' and the principle of legality is to be applied consistently with its normative justification.

IV THE EQUIVALENCE PROPOSITION

Brown was a case which required consideration of the scope of the common law's protection of freedom of speech. That was so because the case involved an article entitled 'The Art of Shoplifting' in a student newspaper which the Federal Court held by majority was not constitutionally protected 'political communication'.⁹⁶ The litigation arose due to the decision of the Commonwealth Office of Film and Literature Classification to refuse the article

⁹⁴ Ibid 545–6 [28], quoting TRS Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148.

⁹⁵ See above n 71 and accompanying text.

⁹⁶ *Brown* (n 25) 242–6 (Heerey J), 257–8 (Sundberg J).

classification.⁹⁷ In any event, the judgment of French J was fascinating in this regard. It was the only judgment to give extended consideration to the common law issue notwithstanding his Honour's (minority) view that some aspects of the relevant publication 'would fall within a broad understanding of political discussion.'⁹⁸

Relevantly, French J sought to explain the 'high' value given by the common law to freedom of expression by reference to its influence on common law doctrine, statutory interpretation, and constitutional characterisation.⁹⁹ But his Honour also outlined in some detail the relevant international law treaties — including art 19 of the *ICCPR* — where 'both the extent and limits of freedom of expression are [expressly] acknowledged'.¹⁰⁰ Upon noting the different wording of art 10 of the *ECHR*, French J stated that '[i]t is nevertheless in terms similar to Art 19 and both are consistent with the common law'.¹⁰¹ This equivalence proposition mirrors the view of the House of Lords in *Derbyshire*, as outlined above, to which French J referred.¹⁰² This may have real significance for the scope of freedom of speech which the common law protects. If the equivalence proposition asserted is taken seriously, then the common law provides equivalent qualified protection to freedom of speech as art 19 of the *ICCPR*, which reads as follows:

- 1 Everyone shall have the right to hold opinions without interference.
- 2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard-

⁹⁷ The background to the decision giving rise to the litigation was provided as follows:

The appellants were the editors of the July 1995 edition of a student newspaper, *Rabelais*, which included an article, 'The Art of Shoplifting'. On the application of the Victorian Retail Traders' Association, the Chief Censor in the Commonwealth Office of Film & Literature Classification decided to refuse classification to the July 1995 edition of *Rabelais*. On the application of the appellants, the respondent reviewed and confirmed the Chief Censor's decision, pursuant to the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). The respondent decided that the article 'instructs in matters of crime' so that, pursuant to the National Classification Code contained in the Act, the respondent was required to refuse classification to the publication.

Ibid 225.

⁹⁸ Ibid 238.

⁹⁹ Ibid 234–5.

¹⁰⁰ Ibid 236.

¹⁰¹ Ibid, citing *Ballina Shire Council* (n 73) 688 (Gleeson CJ), *Derbyshire* (n 35) 550 (Lord Keith) (emphasis added).

¹⁰² *Brown* (n 25) 236.

less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

- 3 The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

If so, then the common law not only protects free speech to the extent provided in arts 19.1 and 19.2, but recognises proportionate limitations of the kind outlined in art 19.3. French J appeared to contemplate this species of common law adoption of art 19's content:

International Conventions to which Australia is a party do not form part of its domestic law unless and until given effect by statute. They can however supply content to a rule of construction that statutes are to be interpreted and applied, as far as their language permits, so as not to be inconsistent with the comity of nations or with the established rules of international law.¹⁰³

If that was French J's intention, then a common law development of real doctrinal and methodological significance was being signalled. For not only is the core content of the 'right' to free speech at common law being outlined but, just as importantly, proportionate limitations of the 'right' to further other legitimate legislative goals are contemplated. The latter, necessarily, involves the incorporation of proportionality into common law method. If so, and notwithstanding that French J's analysis referred to the presumption of consistency with international law, there is no reason in logic or principle why it could not also apply to the content (and method) of the principle of legality regarding freedom of speech. It will, however, be suggested below that there must be some doubt as to whether this *is* what French J had in mind. If it was, however, then his later judgments on the High Court may signal a retreat from the equivalence proposition asserted in *Brown* regarding the nature and scope of the 'right' to freedom of speech at common law.¹⁰⁴

Yet the equivalence proposition regarding common law rights protection and the *ICCPR* was given a strong and more general endorsement in the

¹⁰³ Ibid.

¹⁰⁴ See, eg, *Tajjour* (n 93) 554 [48].

detailed obiter comments of Bell J in the Victorian Supreme Court decision of *Director of Public Prosecutions (Vic) v Kaba* ('Kaba').¹⁰⁵ Relevantly, Bell J said that *all* the rights and freedoms in the ICCPR should now be treated as fundamental at common law for the purposes of the principle of legality.¹⁰⁶ In doing so, his Honour endorsed the approach of Professors Dyzenhaus, Hunt, and Taggart under which they consider it legitimate and consistent with the common law method for judges to draw on international human rights norms to update the 'set of values'¹⁰⁷ that it protects by applying the principle of legality.¹⁰⁸ As Bell J noted, this approach, or at least the possibility that the content of the principle of legality may be deepened by reference to international human rights norms, had been raised extra-judicially by Chief Justice French.¹⁰⁹ Such a process in Bell J's view would 'inform the operation and application of an existing principle of interpretation, not create a law or rule that was independently enforceable'.¹¹⁰ This view echoed the account given by French J in *Brown* of how international (human rights) law may legitimately inform common law interpretation. As a consequence, Bell J argued that this development

would not represent backdoor importation of an unincorporated convention into Australian law. It would bring a greater measure of certainty to the identification of the rights covered by the principle without limiting those already covered or inhibiting the capacity of the common law to develop in this regard.¹¹¹

Importantly for present purposes, once the ICCPR was adopted as the rights touchstone for the principle of legality, this necessitated the incorporation of the concomitant methodology — proportionality — into its framework. As Bell J observed, 'most of the rights specified in the ICCPR are susceptible to limitation by a state provided that the standards of legality and proportionali-

¹⁰⁵ (2014) 44 VR 526 ('Kaba').

¹⁰⁶ *Ibid* 578 [179].

¹⁰⁷ Claudia Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6(1) *New Zealand Journal of Public and International Law* 59, 89.

¹⁰⁸ David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 32.

¹⁰⁹ *Kaba* (n 105) 578, citing Chief Justice RS French, 'Oil and Water: International Law and Domestic Law in Australia' (Brennan Lecture, Bond University, 26 June 2009) 20 [37].

¹¹⁰ *Kaba* (n 105) 580 [185].

¹¹¹ *Ibid* 579 [181], citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

ty (or necessity) are complied with'.¹¹² This related (common law) development was prudent in his Honour's view, for 'Australian courts of high authority have, for some time, been applying a proportionality standard in the process of reading down legislation according to the principle of legality'.¹¹³ That is an important doctrinal and methodological claim. Interestingly, Bell J did not cite the judgment of French J in *Brown* in support. And of those authorities which he did cite — *Evans v New South Wales*,¹¹⁴ *Minister for Immigration and Multicultural Affairs v Al Masri*,¹¹⁵ and *Minister for Immigration and Citizenship v Haneef*¹¹⁶ — the language and method of proportionality was absent from the relevant judicial reasoning. They do not support the claim made in my view.¹¹⁷

But what of the later views of French J upon his elevation to the High Court as Chief Justice? His Honour's judgment in *City of Adelaide* did appear to involve some form of judicial balancing.¹¹⁸ The case concerned the validity of a local council by-law that prohibited any person without a permit from preaching, canvassing, haranguing, touting for business, or conducting any survey or opinion poll on a public road.¹¹⁹ The relevant law-making power authorised local councils to make by-laws 'generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants'.¹²⁰ Samuel Corneloup was convicted under the by-law for preaching about his religious beliefs and associated political convictions without a permit on the streets of Adelaide, while the Council sought to bring an injunction against him and his brother to restrain them from further preaching.¹²¹ Clearly enough, the enforcement of the by-law engaged the common law (and indeed constitutional) free speech rights of the Corneloup

¹¹² *Kaba* (n 105) 580 [186].

¹¹³ *Ibid.*

¹¹⁴ (2008) 168 FCR 576 ('*Evans*').

¹¹⁵ (2003) 126 FCR 54.

¹¹⁶ (2007) 163 FCR 414.

¹¹⁷ See Dan Meagher, 'The Principle of Legality and Proportionality in Australian Law' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114, 127–32. But see Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 362–9.

¹¹⁸ See *City of Adelaide* (n 17) 32–3 [44]–[46].

¹¹⁹ *Ibid* 23–4 [25]–[26].

¹²⁰ *Local Government Act 1934* (SA) s 667(1)(9)(XVI).

¹²¹ *City of Adelaide* (n 17) 15 [1] (French CJ).

brothers.¹²² This brought the principle of legality into play for French CJ.¹²³ In this regard his Honour said the by-law was *intra vires* in respect of the law-making power if used to control only the mode or circumstances of the proposed preaching and haranguing, and not its content.¹²⁴ That is, the validity of the by-laws as applied required content neutrality.

The law-making power did not, however, expressly authorise interference with common law rights and freedoms, as Heydon J noted in dissent.¹²⁵ French CJ must, then, have reached this construction on the assumption that the very nature of the law-making power in this local government context authorised by necessary implication at least some interference with the common law free speech rights of persons (like the Corneloup brothers) on the streets of Adelaide. But the *extent* of that interference had to be determined for, as noted above, the law-making power did not make that clear. The broad and general wording of the law-making power left open interpretive scope for the protection of the common law free speech rights of the Corneloup brothers (and others similarly placed) to the extent that this was compatible with what the statute was trying to achieve.

In other words, as French CJ has said extra-curially, '[w]here the text of a statute presents constructional choices, the principle of legality will favour that choice which least disturbs common law freedoms.'¹²⁶ In making that 'constructional choice' in *City of Adelaide*, French CJ sought to give the by-law a construction that would achieve its goal or purpose (and that of its empowering statute) in a manner that least interfered with the common law free speech rights of the Corneloup brothers. It was in this sense that a balance of sorts was arguably struck between giving effect to the objective of the statute (the primary interpretive duty) and the common law free speech rights of those affected in doing so (an important, but secondary, concern).

That process, I would argue, is still firmly within the realms of interpretation. It was done to ascertain the extent to which the law-making power authorised by necessary implication (by regulation or by-law) the necessary interference with common law rights and freedoms in order to achieve its purpose. It was not undertaken to judicially evaluate whether the Council could justify the infringement of the Corneloup brothers' common law free

¹²² See *ibid* 68 [152] (Heydon J).

¹²³ *Ibid* 30-1 [42]-[43].

¹²⁴ *Ibid* 33 [46].

¹²⁵ *Ibid* 70 [158]-[159].

¹²⁶ Chief Justice Robert French, 'Bending Words: The Fine Art of Interpretation' (Guest Lecture Series, University of Western Australia, 20 March 2014) 7.

speech rights in pursuit of its legislative policy. That inquiry is the essence of proportionality as I understand it. It explains why the language and method of proportionality was absent from French CJ's judgment.

It is also worth noting that French CJ was very much alive to the issue of whether proportionality had a role to play in the method of the principle of legality at the time his Honour delivered his judgment in *City of Adelaide*. In an extra-curial speech given just prior to the hearings for the case, his Honour raised this precise issue and whether the principle might be developed in that direction.¹²⁷ The response to his own rhetorical question was: 'I make no comment'.¹²⁸ It would be odd, then, if French CJ's judgment is to be understood as incorporating considerations of justification and proportionality into the method of the principle of legality. Indeed, the following detailed observations which his Honour made in *City of Adelaide* regarding the nature and role of proportionality seem to confirm as much:

Proportionality is not a legal doctrine. In Australia it designates a class of criteria used to determine the validity or lawfulness of legislative and administrative action by reference to rational relationships between purpose and means, and the interaction of competing legal rules and principles, including qualifications of constitutional guarantees, immunities or freedoms. Proportionality criteria have been applied to purposive and incidental law-making powers derived from the *Constitution* and from statutes. They have also been applied in determining the validity of laws affecting constitutional guarantees, immunities and freedoms, including the implied freedom of political communication which is considered later in these reasons.¹²⁹

That account is consistent with an earlier observation of French CJ in *Momcilovic v The Queen* ('*Momcilovic*')¹³⁰ as to the role of proportionality in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic):

[A] proportionality assessment of the reasonableness of legislation is not an interpretive function. ... Section 7(2) cannot ... form part of the interpretive pro-

¹²⁷ Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87(12) *Australian Law Journal* 820, 827–8.

¹²⁸ *Ibid* 828.

¹²⁹ *City of Adelaide* (n 17) 37 [55].

¹³⁰ (2011) 245 CLR 1 ('*Momcilovic*').

cess because the proportionality assessment that it requires cannot be undertaken until a construction has been reached.¹³¹

There were in fact four members of the High Court in *Momcilovic* who expressed this concern with incorporating proportionality into the Charter's interpretive process:¹³²

[T]he justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the parliament and the judiciary which, to the extent that it can validly be disturbed, is not to be so disturbed except by clear words. The Charter does not have that effect.¹³³

Moreover, the more recent judgment of French CJ, Kiefel, Bell and Keane JJ in *McCloy v New South Wales* ('*McCloy*') detailed, again, the variety of contexts under Australian law in which courts have developed and used proportionality.¹³⁴ There was no mention of the principle of legality (or common law interpretive principles more generally), and the contexts outlined all involve determining the validity of legislation or executive action once its meaning has been ascertained. So it would appear that *if* French J's endorsement of the equivalence proposition in *Brown* was to signal that the extent *and* limit of freedom of speech at common law was coextensive with art 19 of the *ICCPR*, then his Honour's work on the High Court suggested a retreat from that position.

V THE INEXORABILITY OF THE EQUIVALENCE PROPOSITION?

Even if the High Court has not accepted the equivalence proposition, at least regarding the incorporation of proportionality, is that position sustainable

¹³¹ Ibid 43–4 [34]. As Grégoire Webber has noted, '[t]he judge, in specifying the limitation of a right left open by the constitution, is not employing the lawyer's task of interpretation; rather, the judge is engaging in an "essentially political" enterprise of constructing the right by appeal to first-order reasons in practical reasoning': Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009) 206.

¹³² *Momcilovic* (n 130) 40–4 [24]–[36] (French CJ), 172–5 [432]–[439] (Heydon J), 218–20 [568]–[574] (Crennan and Kiefel JJ).

¹³³ Ibid 44 [36] (French CJ). See also Professor Finnis, who notes that

there is little or nothing judicial — nothing *law applying* — about assessments of proportionality in relation to rights such as those in the *ECHR*, when these assessments are made by courts coming fresh to them in the context of general legislative or legislatively approved arrangements for social life.

John Finnis, 'Judicial Power: Past, Present and Future' (Speech, Policy Exchange Judicial Power Project Relaunch, 20 October 2015) 21 (emphasis in original).

¹³⁴ *McCloy* (n 22) 195 [3]–[4].

once it has recognised that freedom of speech at common law has 'independent and intrinsic weight'? Maybe not. Once freedom of speech at common law has evolved doctrinally from residual liberty to principle, the move towards the incorporation of proportionality may well be inexorable. In Australia, as noted, this evolution was triggered by recognition of a constitutional principle of political speech and the development of the common law principle of legality with a distinct normative justification. And the meaningful application of both principles *requires* that freedom of speech at common law has a substantive content which approximates a 'right', ie an articulated conception of the expressive conduct which is *prima facie* protected at common law.

If so, there may then be a degree of inevitability that judges will orient towards legitimate legal sources and extant domestic principles to provide (and incorporate) that content. This is what French J may have been doing in *Brown*, what the House of Lords was undertaking in *Derbyshire*, and what Bell J was clearly proposing in *Kaba*. In the latter case, for example, Bell J (quite correctly in my view) stated the contemporary position at common law: 'The premise of the principle of legality is that individual rights and freedoms under the common law have an anterior value which counts in, and represents the starting point of, the process of interpreting legislation impacting thereon.'¹³⁵ That being so, his Honour offered the following proposition:

That could, and in my view should, happen by treating the rights and freedoms in the *ICCPR* as fundamental rights and freedoms for the purposes of the principle of legality, thereby bringing greater coherence, discipline and transparency to the process of engaging with human rights in the course of statutory interpretation.¹³⁶

Such a development, as noted, necessitates the incorporation of proportionality. And if freedom of speech at common law is 'not ... absolute'¹³⁷ — as the High Court has clearly stated — then to do so would recognise and formalise that doctrinal reality. If so, common law rights and freedoms do have 'justified limits' as Hanna Wilberg has forcefully argued.¹³⁸

It is the possible inexorability of this common law development which might be the key and (at least to my mind) surprising insight of this article.

¹³⁵ *Kaba* (n 105) 574 [170].

¹³⁶ *Ibid* 578 [179].

¹³⁷ *Coleman* (n 70) 75 [185] (Gummow and Hayne JJ).

¹³⁸ Hanna Wilberg, 'Common Law Rights Have Justified Limits: Refining the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 139, 139.

Indeed, it has occurred already in the United Kingdom. In *Pham v Secretary of State for the Home Department*,¹³⁹ for example, Lord Reed made clear that he considered that proportionality was involved when the principle of legality was applied to the construction of statutes.¹⁴⁰ And more recently, the UK Supreme Court in *R (UNISON) v Lord Chancellor*¹⁴¹ has decisively confirmed the role of proportionality in the methodology of common law rights protection.¹⁴² Yet whether or not it is something to be welcomed is, of course, another matter. In the UK context, Jason Varuhas has queried the necessity and wisdom of this development when the *HRA* (still) makes the breach of *ECHR* rights directly actionable,¹⁴³ and the possibility of the *HRA*'s repeal remains just that.¹⁴⁴ Moreover, he raises the following important concern regarding the 'augmented legality principle':

In principle a requirement that intrusions upon private rights or residual liberties should be no more than strictly necessary could be read in as a limit on any statutory power. Given most powers, if exercised, will intrude upon some right or personal freedom this development was potentially far-reaching. For a decision-maker the interests of the individual subject to the decision would be a primary focus, whereas the public interests for which Parliament had conferred the powers would be demoted from controlling to countervailing interests.¹⁴⁵

In my view, such a development would also be problematic in the Australian context, if endorsed by the High Court. As noted earlier, there is an important distinction between judicial interpretation and proportionality analysis. The latter involves a judicial evaluation of whether the statutory infringement of a right can be justified in pursuit of the relevant legislative policy. It is not a tool that assists in working out the *meaning* of legislation that is the object of judicial interpretation, of which the principle of legality forms an important part. Indeed, logically, one must first ascertain the meaning of a statute (ie whether and to what extent it infringes a right) *before* an evaluation can be made as to whether the infringement is a justified limit.

¹³⁹ [2015] 1 WLR 1591 (Supreme Court).

¹⁴⁰ *Ibid* 1629–30 [118]–[119].

¹⁴¹ [2017] 3 WLR 409.

¹⁴² *Ibid* 442 [107] (Lord Reed).

¹⁴³ Varuhas (n 52) 20.

¹⁴⁴ *Ibid* 35.

¹⁴⁵ *Ibid* 18.

There are also legitimate separation of powers concerns that would attend its incorporation. The balancing of competing rights and interests, and striking a reasonable compromise between them in law, is a core function of the legislature. To the extent that proportionality requires this kind of analysis, there is a serious question as to whether judges have the time, expertise, and resources to do so properly in the context of litigation. The very nature of the proportionality inquiry which involves evaluating whether the infringement of a common law right or freedom is justified in the pursuit of legislative policy, also sits uncomfortably with the interpretive role of judges under the *Constitution* and its strong separation of judicial power.¹⁴⁶ And there would, arguably, be significant doubt as to the compatibility of such a development with the contemporary justification for the principle detailed above. The courts require 'some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights ... but has also determined upon abrogation or curtailment of them.'¹⁴⁷ But if the content of the common law 'right' to freedom of speech is qualified by a proportionality analysis that is, necessarily, context- (and therefore case-) specific, it is difficult to see how parliaments (and parliamentary counsel) can 'squarely confront' and 'consciously decide' the rights issues in their legislation.

VI IS THERE AN ALTERNATIVE AT COMMON LAW TO ADOPTING THE EQUIVALENCE PROPOSITION (AND PROPORTIONALITY)?

In *McCloy*, a majority of the High Court accepted 'the utility of such criteria' that European-style structured proportionality provided 'to assist in the determination of the limits of legislative [and executive] powers which burden the [implied] freedom.'¹⁴⁸ This three-stage form of proportionality testing is, then, a tool of analysis which judges *may* use to protect (and qualify) the constitutional principle of freedom of political speech in Australia. Does this underline, if not propel, the inexorability of the equivalence proposition being adopted at common law regarding freedom of speech? Especially when, '[o]f necessity, the common law must conform with the *Constitution*'?¹⁴⁹

¹⁴⁶ *Momcilovic* (n 130) 44 [36] (French CJ).

¹⁴⁷ *Coco* (n 83) 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹⁴⁸ *McCloy* (n 22) 195 [4] (French CJ, Kiefel, Bell and Keane JJ).

¹⁴⁹ *Lange* (n 10) 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

Not necessarily. In terms of the implied freedom, *McCloy* did ‘not elevate three-staged proportionality testing to the level of constitutional principle.’¹⁵⁰ And if proportionality analysis does not presently form part of common law rights methodology in Australia — as I have suggested — then its incorporation would, necessarily, be a judicial choice. If so, then the High Court may choose to do something else for freedom of speech at common law. Moreover, it is not the case that ‘[t]he distinction between the implied freedom of political communication and a personal right to free communication is largely a theoretical distinction.’¹⁵¹ A successful common law (free speech) argument does *not* turn upon the success or otherwise of the constitutional (implied freedom) issue.¹⁵² Though closely related, they are separate issues with different core inquiries. The focus of the relevant analysis is quite different depending on which issue is being judicially considered. In the common law context, the judicial concern *is* to protect the relevant instance of (political) speech from legislative encroachment if interpretively possible. But with the implied freedom ‘the central question is what the impugned law does, not how an individual might want to construct a particular communication.’¹⁵³

There is, then, an opportunity for the High Court to develop a distinctive, indigenous conception of freedom of speech at common law.¹⁵⁴ But what might such a common law conception of freedom of speech look like? The methodology of the principle of legality may provide the seeds of something distinctive. It is of course an interpretive principle. This means that the protection it provides to fundamental rights at common law — including freedom of speech — cannot resist a statute which makes clear that a fundamental right, freedom, or principle is intended to be curtailed or abrogated. If so, then why not articulate a conception of freedom of speech at common law that is genuinely robust and not subject to ‘justified limits’? Such a conception could provide the citizenry with meaningful and durable free speech protection. It would provide a core content — a ‘baseline of acceptable law and conduct for government’¹⁵⁵ — judicially enforced through the application of the principle of legality. The legislature could still (if so minded) curtail or abrogate freedom of speech in a specific context. But if the courts were to

¹⁵⁰ *Brown v Tasmania* (2017) 261 CLR 328, 376 [159] (Gageler J).

¹⁵¹ *Muldoon v Melbourne City Council* (2013) 217 FCR 450, 525 [365] (North J).

¹⁵² See, eg, *Coleman* (n 70); *Evans* (n 114) 589 [7] (French, Branson and Stone JJ).

¹⁵³ *APL Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 451 [381] (Hayne J).

¹⁵⁴ Thanks to Andrew Kenyon, Adrienne Stone and James Weinstein for urging me to consider this line of inquiry.

¹⁵⁵ Rishworth (n 32) 106.

require nothing short of express and precise statutory wording in order to do so — which is suggested below regarding speech on issues of political and public concern¹⁵⁶ — then the protection offered by the common law would be significant.

As to that content and method, the High Court might consider how the United States Supreme Court has infused First Amendment doctrine with such strength and vitality. That step would not be taken in order to undertake a wholesale incorporation of that doctrine into Australian law — which would of course be constitutionally inappropriate — but to see whether aspects of it might fit our existing constitutional and common law (free speech) architecture. For example, the High Court has already defined 'political speech' (in the constitutional context) in a manner which is broad, robust, and open, as noted above.¹⁵⁷ It could define freedom of speech more generally in similar terms. This might cover

any activity that makes use of a conventional mode or medium of communication. For example, talking, singing, dancing, parading, broadcasting, filmmaking and distribution, musical composition and performance, painting, sculpture and displaying objects in a museum ...¹⁵⁸

Freedom of speech could extend also to any activity or conduct the (sole) function of which is expressive.¹⁵⁹ This would build upon existing High Court doctrine, which recognises that non-verbal conduct may constitute 'political communication' for purposes of the implied freedom:

[F]reedom of communication is not limited to verbal utterances. Signs, symbols, gestures and images are perceived by all and used by many to communicate information, ideas and opinions. Indeed, in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it. Thus, in *Brown v Louisiana*, the United States Supreme Court held that a silent demonstration on the premises of a public library was constitutionally protected speech for the purpose of the First Amendment. Similarly, that Court has held that peaceful picketing to publicise a labour dispute was constitutionally protected speech.¹⁶⁰

¹⁵⁶ See below nn 164–7 and accompanying text.

¹⁵⁷ See above nn 63–71 and accompanying text.

¹⁵⁸ James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999) 32.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Levy* (n 68) 622–3 (McHugh J).

Freedom of speech defined in these terms would provide ‘special recognition’¹⁶¹ of its protection at common law. Yet even in the United States not all speech and expressive conduct is afforded equal (constitutional) protection. Relevantly, the US Supreme Court has said that ‘speech on public issues occupies the “highest rung of the hierarchy of First Amendment values”, and is entitled to special protection.’¹⁶² On the other hand, some speech, such as obscenity, attracts no First Amendment protection.¹⁶³ Here, the High Court could use the extant methodology of the principle of legality to develop the sort of categorical approach which exists in the United States and which provides such strong (constitutional) protection to freedom of speech. The following is one possible common law (interpretive) typology:

- Political speech or speech on ‘issues of public concern’¹⁶⁴ — express statutory words addressed to the precise manner of communication are required to curtail or infringe this speech.
- All other speech and expressive conduct — the text, context, and purpose of the statute must make clear that ‘the legislature has not only directed its attention to [freedom of speech] but has also consciously decided upon abrogation or curtailment.’¹⁶⁵

In terms of the first category of speech, this approach intersects with the implied freedom, though its scope may be wider. For example, public discussion regarding whether a painting displayed in a public art gallery was obscene may not be ‘political speech’ in Australia but would clearly be an ‘issue of public concern.’¹⁶⁶ Likewise, controversial lines of scientific and academic inquiry (eg on climate change, or anti-vaccination), confrontational forms of musical or artistic expression (eg Robert Mapplethorpe’s photography, or Satanist black metal), and the advocacy (and criticism) of religious doctrine may all well raise issues of public concern, though none are political in the relevant constitutional sense. It demonstrates the breadth of freedom of speech protected under this common law conception.¹⁶⁷

¹⁶¹ *Tajjour* (n 93) 545 [28] (French CJ).

¹⁶² *Connick v Myers*, 461 US 138, 145 (White J) (1983) (citations omitted) (‘*Connick*’).

¹⁶³ *Miller v California*, 413 US 15, 23 (Burger CJ) (1973).

¹⁶⁴ *Connick* (n 162) 154 (White J).

¹⁶⁵ *Coco* (n 83) 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹⁶⁶ See *Pell v Council of Trustees of National Gallery of Victoria* [1998] 2 VR 391.

¹⁶⁷ Thanks to one of the referees for suggesting that I explain further what this category of speech might cover.

Moreover, the depth of that protection is facilitated by the strong clear statement rule proposed — nothing short of express and precise statutory wording will trump it. And such an approach has three important consequences. First, statutes will be interpreted in a manner which provides the fullest possible protection to this broad common law conception of freedom of speech. Second and relatedly, doing so will often avoid the constitutional (implied freedom) issue — and so possible invalidity — whilst protecting political speech. And finally, the proposed clear statement rule would sharpen and clarify the constitutional issue by textually flagging when the implied freedom might be in legislative play. This would require serious parliamentary deliberation about freedom of (political) speech in its legislation, which vindicates the contemporary justification for the principle of legality. And, by making clearer the legislative policy which underpins the infringement of political speech, this would assist in determining whether (or not) it can be justified under the implied freedom analysis.

In setting a high and categorical threshold for infringement, the interpretive typology outlined above would provide freedom of speech in Australia with a distinctive model of common law (and constitutional) protection. It would use and expand upon the existing methodology of the principle of legality and take seriously its normative justification. Parliament would still have the final say on most difficult and contested free speech issues. But the typology proposed would give legislators clear and prior notice as to the nature and scope of the 'right' to freedom of speech which Australians possess at common law. In doing so, it would provide robust protection for *all* kinds of speech and expressive conduct, but especially those which relate to matters of government, politics, and public concern. Such an approach would, then, build on existing doctrine (in the common law way) and is consistent with — indeed informed by — the manner in which the *Constitution* recognises and protects freedom of speech. It also eschews proportionality which, arguably, sits more comfortably with the judicial role under a constitutional separation of powers and the nature of statutory interpretation.

In any event, my aim in this part has not been to develop a new and fully-formed common law theory of freedom of speech. That is a considerable undertaking which lies well beyond the scope of this article. Nor is it to suggest that the interpretive typology and approach outlined above is the only alternative (common law) model available for freedom of speech. The far more modest aim was to simply suggest that in Australia there *is* a doctrinal alternative to adopting the equivalence proposition (and proportionality) to outline the protection it provides to freedom of speech at common law.

VII CONCLUSION

The analysis undertaken in this article has revealed an interesting dynamic. It appears that once freedom of speech is treated as something more than a residual liberty at common law, it triggers a series of incremental and maybe inexorable doctrinal developments. And the trajectory of those developments in Australia — and the normative justification for them — may ultimately require the judicial articulation of a ‘right’ to freedom of speech at common law. Our constitutional principle of political speech and the principle of legality cannot be meaningfully applied unless freedom of speech has a core content that provides the common law backdrop against which statutes are interpreted. To be sure, a common law ‘right’ to freedom of speech of this kind is not directly actionable. But *if* the principle of legality can be applied, then it provides an interpretive remedy to the individual litigant by protecting their expressive conduct which otherwise would be limited or abrogated by the relevant statute. It is in this sense that Australia now has — indeed *must* have — a common law ‘right’ to freedom of speech.

Yet this doctrinal and taxonomic transformation is not complete. If my analysis in Part V is correct, the final incremental step may see the High Court at some point incorporate proportionality into the methodology of common law rights protection. That development is problematic in my view, but the doctrinal and normative forces driving it may well be inexorable. However, the article did conclude that there *is* a doctrinal alternative to adopting the equivalence proposition and its concomitant method of proportionality. There is, then, an opportunity for the High Court (if so minded) to develop a distinctive, indigenous conception of freedom of speech at common law.