PRIOR RESTRAINT AND PROTEST REGULATION

CATHERINE ZHOU*

In United States ('US') First Amendment jurisprudence, restrictions on expression in advance of publication are seen as inherently more threatening to expression than subsequent punishments. These restrictions are known as prior restraints. Although the concept of prior restraint is embedded in US law, it has not received analogous attention in Australia. This article interrogates judicial treatment of the concept by Australian courts, and the inconsistencies between its application to the implied freedom of political communication compared to interlocutory injunctions in defamation. It argues that principles of prior restraint can be accommodated in Australian law to strengthen protections of expression. It does so by reference to protest regulation in Australian states and territories, contending that a lens of prior restraint foregrounds harms in the permit and authorisation schemes which apply to public assemblies.

I INTRODUCTION

In United States ('US') First Amendment jurisprudence, the doctrine of prior restraint imposes a heavy presumption against constitutional validity for restrictions on expression in advance of publication. Australian law does not recognise the concept of prior restraint[1] to the same extent. Instead, courts have expressed wariness about prior restraint, describing it as 'a loose concept which has been said to provide an "impetus to distort doctrine in order to expand protection"'.[2] This view results in prior restraints being judged similarly to other forms of restraints. Despite these attitudes, the concept of prior restraint has not been wholly rejected. Other judges have embraced its use in the context of the implied freedom of political communication,[3] and the history of prior restraint has been pivotal in the development of jurisprudence on interlocutory injunctions

* BA/LLB (Monash).

1 The phrase 'doctrine of prior restraint' is used to refer to the body of US First Amendment jurisprudence. The phrase 'concept of prior restraint' is used to refer to the broader proposition that prior restraints pose a particular harm to expression which is more threatening than subsequent punishments.

2 *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 84–5 [219] (Edelman J) ('*LibertyWorks*'), quoting John Calvin Jeffries Jr, 'Rethinking Prior Restraint' (1983) 92(3) *Yale Law Journal* 409, 420.

3 See below Part IV(B).

for defamation.[4] This view applies heightened scrutiny to prior restraints, thereby distinguishing such restraints from other impositions on expression. The result is that the concept occupies an uncertain position in Australian law.

The purpose of this article is to analyse the concept of prior restraint in Australia. It borrows from First Amendment jurisprudence to identify the underlying rationales of the doctrine of prior restraint and considers the extent to which it can be recognised in Australia. Ultimately, this article argues that the concept of prior restraint deserves more extensive consideration in Australian jurisprudence. Specifically, the concept of prior restraint should inform evaluative exercises in Australian law concerning speech restrictions, because it assists in identifying restrictions on expression that are otherwise unrecognised. In this way, incorporation of the concept does not require wholesale importation of a foreign doctrine. Rather, it represents a call for principled consistency in the analysis of expression and political communication in a way that can be accommodated within frameworks such as structured proportionality. Consideration of principles in relation to expression are particularly important in the context of recent restraints on protest in Australian jurisdictions.[5]

Accordingly, Part II begins by describing the concept of prior restraint. Part III considers its application under the First Amendment and criticisms of the doctrine as it has been interpreted in the US. Part IV turns to Australian jurisprudence, considering the decisions in *LibertyWorks Inc v Commonwealth*[6] ('*LibertyWorks*') and *Australian Broadcasting Corporation v O'Neill* ('*O'Neill*').[7] It finds that the concept of prior restraint in the implied freedom of political communication is disputed, but the relevance of prior restraint has been recognised in the context of interlocutory injunctions for defamation, as judges accept that there is a heavy burden of justification before such an injunction can be imposed. In analysing this case law, Part IV concludes that the current application of the concept of prior restraint in Australian law is principally incongruous, given that the justifications for the application of the concept of prior restraint to interlocutory injunctions for defamation also extend to other contexts in which expression is threatened. Recognising the analytic value of the concept of prior restraint does not require the recognition of a burden as heavy as the US presumption against constitutional validity. Nonetheless, the principles of the concept of prior restraint may be applicable in Australia. Finally, Part V considers protest regulation as a case study for uses of prior restraint. Australian jurisdictions impose varying authorisation

4 See below Part IV(C).

5 For example, New South Wales ('NSW') Police rejected pro-Palestinian activists' request for an authorised rally in October 2023: Olivia Ireland and Michael Koziol, 'Pro-Palestine Protesters Won't "Commandeer Sydney Streets", Says Minns', *The Sydney Morning Herald* (online, 11 October 2023) <https://www.smh.com.au/national/nsw/nsw-police-reject-planned-pro-palestinian-protest-launch-new-operation-to-gather-intelligence-20231011-p5ebe9.html>. See also Bridget Murphy and Romy Stephens, 'Rising Tide's Newcastle Coal Port Protest Blocked by NSW Supreme Court', *ABC News* (online, 7 November 2024) <https://www.abc.net.au/news/2024-11-07/supreme-court-prohibits-rising-tide-newcastle-climate-protest/104547892>.

6 *LibertyWorks* (n 2).

7 (2006) 227 CLR 57 ('*O'Neill*').

schemes on public assemblies. A prior restraint analysis reveals dimensions of these schemes that are problematic for reasons relating to the implied freedom of political communication and the construction of institutional norms under negotiated management models of protest policing.

II THE CONCEPT OF PRIOR RESTRAINT

Prior restraint refers to restrictions on expression in advance of publication. In contrast, subsequent punishment is a penalty which is imposed after a communication has been made.[8] The theoretical basis of this distinction is that certain features of prior restraints are inherently more threatening to expression than subsequent or final restraints. One such feature is the breadth of expression captured by a prior restraint. To be effective, a prior restraint 'must often restrict *all* relevant expression, whether or not fully protected, while the adjudicatory body determines whether the expression should be subjected to a final restraint'.[9] A system of prior restraint is therefore considered 'more inhibiting' than subsequent punishment. 'It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place'.[10] Another feature is that prior restraint requires 'adjudication in the abstract'.[11] Because the restraint is imposed prior to a communication, the evaluation of harm is speculative rather than based on the actual eventuality of harm.[12] This may create a propensity toward an adverse decision, as a decision to suppress in advance 'is usually more readily reached, on the same facts, than a decision to punish after the event'.[13] Additionally, the decision to restrict expression rests with an executive official rather than the judicial system, and occurs through administrative rather than criminal procedure. Less procedural protections apply in the administrative context.[14]

However, not all prior restraints restrict to the same degree. The concept of prior restraint can be subdivided into further categories, depending on the extent of the limitation. Emerson proposes a four-part typology of prior restraint.[15] The first and 'clearest form of prior restraint' arises in situations 'where the government limitation … undertakes to prevent future publication or other communication

8 Thomas I Emerson, 'The Doctrine of Prior Restraint' (1955) 20(4) *Law and Contemporary Problems* 648, 648 <https://doi.org/10.2307/1190292>.

9 Martin H Redish, 'The Proper Role of the Prior Restraint Doctrine in First Amendment Theory' (1984) 70(1) *Virginia Law Review* 53, 55 (emphasis in original) <https://doi.org/10.2307/1072824>.

10 Thomas I Emerson, *The System of Freedom of Expression* (Random House, 1970) 506.

11 Vincent Blasi, 'Toward a Theory of Prior Restraint: The Central Linkage' (1981) 66(1) *Minnesota Law Review* 11, 49 ('Toward a Theory of Prior Restraint').

12 Ibid; Michael I Meyerson, 'Rewriting *Near v Minnesota*: Creating a Complete Definition of Prior Restraint' (2001) 52(3) *Mercer Law Review* 1087, 1142 ('Rewriting *Near*').

13 Emerson, 'The Doctrine of Prior Restraint' (n 8) 657.

14 Ibid 657–8.

15 Emerson's typology has been adopted as a frame of analysis in subsequent literature on the doctrine of prior restraint: see, eg, Jeffries Jr (n 2) 421; Meyerson, 'Rewriting *Near*' (n 12) 1138; Alexander E Blanchard, 'A False Choice: Prior Restraint and Subsequent Punishment in a Wikileaks World' (2013) 24(1) *University of Florida Journal of Law and Public Policy* 5, 23.

without advance approval of an executive official', such as 'motion picture censorship' or 'the requirement of permits for park meetings'.[16] The second 'involves judicial officials and is based upon the injunction or similar judicial process, enforced through a contempt proceeding'.[17] This includes interlocutory injunctions in defamation. The third involves restraints 'which make unlawful publication or other communication unless there has been previous compliance with specific conditions imposed by legislative act',[18] such as 'requiring registration of lobbyists or of certain political organizations'.[19] The fourth involves 'elements of prior restraint … but in which the restraint appears more indirect or secondary to some other immediate objective'.[20] For example, using political views as a test for holding an office does not primarily intend to restrict expression, but may have ancillary effects on expression.[21]

Prior restraint has a long history in the common law. In England, the *Licensing of the Press Act 1662,* 14 Car 2, c 33 ('*Licensing Act 1662*') imposed an early form of prior restraint prohibiting 'seditious and heretical' books, and the importation or sale of books without a licence.[22] Throughout the 18th century, freedom of the press from licensing began to 'assume the status of a common law or natural right'.[23] In his *Commentaries on the Laws of England* ('*Commentaries*'), these developments led Blackstone to write that '[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published'.[24] Blackstone particularly castigated the restrictive power of a licensor, which he viewed as 'subject[ing] all freedom of sentiment to the prejudices of one man'.[25] These passages sharply bifurcate prior restraint and subsequent punishment.

16 Emerson, 'The Doctrine of Prior Restraint' (n 8) 655.

17 Ibid. Smolla highlights the first two categories as prior restraints '[i]n modern practice'. He frames the categories as 'regimes requiring some form of license, permit, or preclearance by government officials' and 'a court order enforceable through the contempt power': Rodney A Smolla, 'Why the SEC Gag Rule Silencing Those Who Settle SEC Investigations Violates the First Amendment' (2023) 29(1) *Widener Law Review* 1, 3–4.

18 Emerson, 'The Doctrine of Prior Restraint' (n 8) 656.

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid 650.

23 Ibid 651.

24 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) bk 4, 151 (emphasis in original). Jeffries Jr observes that this view 'would have imposed little or no substantive limit on governmental authority to suppress speech, so long as such suppression was done by subsequent punishment and not by prior restraint': Jeffries Jr (n 2) 413.

25 Blackstone (n 24) 152.

III THE DOCTRINE OF PRIOR RESTRAINT IN FIRST AMENDMENT JURISPRUDENCE

A Case Study Selection

A preliminary issue is the justification of the US prior restraint doctrine as a case study for a comparative constitutional exercise. The relevance of US jurisprudence to Australian law is variable. The High Court has historically utilised First Amendment cases to assess the implied freedom of political communication,[26] but has rejected the applicability of First Amendment case law in other instances.[27] Such rejections have been justified by reference to the structural differences between American and Australian legal systems,[28] through emphasis on the text and structure of the *Constitution*.[29] In *Monis v The Queen*, the Court held that '[t]here is little to be gained by recourse to jurisprudence concerning the First Amendment'.[30] For the purposes of this article, a comparative focus on the US doctrine is founded on two bases.

First, Australian and American constitutional models are historically intertwined.[31] Selecting US doctrine is therefore consistent with a comparative methodology based on similarity,[32] while isolating the variables associated with differing constitutional approaches to expression and differing treatments of prior restraint. Such similarity is illustrated by the common historical antecedent of the concept of prior restraint in both jurisdictions. Prior restraint in the US derives its conceptual origin from early restrictions on speech in England: specifically, the *Licensing Act 1662* and Blackstone's subsequent warning against the imposition of prior restraints.[33] The First Amendment was 'designed to foreclose in America the establishment of any system of prior restraint on the pattern of the English censorship system'.[34] In *Near v Minnesota ex rel Olson* ('*Near*'), described as 'the doctrine's leading precedent',[35] the Court expressly cited the English struggle against previous restraints upon publication to justify its decision.[36] This same antecedent is recognised in Australia, to the extent that the concept of prior restraint has been accepted. In the context of interlocutory injunctions in defamation, the Court cites Blackstone and the late 17th century conflict over free speech in

26 Anthony Davidson Gray, 'The *First Amendment* to the United States *Constitution* and the Implied Freedom of Political Communication in the Australian *Constitution*' (2019) 48(3) *Common Law World Review* 142, 151–5 <https://doi.org/10.1177/1473779519863070>.

27 Ibid 155–7.

28 See, eg, ibid 155, quoting *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ).

29 Gray (n 26) 156.

30 *Monis v The Queen* (2013) 249 CLR 92, 207 (Crennan, Kiefel and Bell JJ).

31 On the similarity of the constitutional models more generally, see Gray (n 26) 157.

32 Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014) 245–53 <https://doi.org/10.1093/acprof:oso/9780198714514.001.0001>.

33 See Emerson, 'The Doctrine of Prior Restraint' (n 8) 650–2. Emerson notes that developments in the US 'paralleled' the situation in England: at 651.

34 Ibid 652. Although the First Amendment is not limited to enactment of Blackstone's warning against prior restraint: Zechariah Chafee Jr, *Free Speech in the United States* (Harvard University Press, 1948) 9–12.

35 Jeffries Jr (n 2) 414.

36 *Near v Minnesota ex rel Olson*, 283 US 697, 713 (Hughes CJ for the Court) (1931) ('*Near*').

England to justify reference to the concept of prior restraint.[37] Equally, in relation to the implied freedom of political communication, Gageler J has stated that prior restraint, as understood in Australia, detracts from the 'inherited common law freedom' recognised by Blackstone.[38]

Second, the US doctrine of prior restraint in this article is used as an example of the concept being enshrined within constitutional analysis and extrapolated beyond the context of the press. The fact that the concept of prior restraint in the US extends beyond that of comparable common law countries tests the normative justifications for the concept to an extent that other jurisdictions have not experienced. This way, divergences between US and Australian systems are used to interrogate a theoretical principle[39] – being whether the concept of prior restraint has merit, and whether it can be incorporated in ways that are tailored to the Australian constitutional system. The argument is for 'engagement' and not that Australian law must converge with US law or treat US law as binding.[40] Accordingly, selection of this case study is consistent with the position that the *United States Constitution* and the *Australian Constitution* are structurally different and not directly comparable. This article does not propose that First Amendment jurisprudence itself is invoked; rather, it is an analysis similar to the way that the High Court has treated US jurisprudence in the past: as an 'analogical' mode of reasoning derived from comparable fact patterns, which may supply guidance but is not necessarily instructive.[41] In *Brown v Tasmania*, for example, Kiefel CJ, Bell and Keane JJ considered that it was not necessary to examine the void-for-vagueness doctrine or its application in US courts, but recognised that the vagueness of laws may nonetheless be considered according to the questions in *Lange v Australian Broadcasting Corporation* ('*Lange*').[42]

B The Operation of the US Doctrine of Prior Restraint

In First Amendment jurisprudence,[43] the doctrine of prior restraint generally forbids any system of prior restraint in any area of expression within the boundaries of the Amendment.[44] The doctrine turns 'not on the content or substantive character

37 See, eg, *O'Neill* (n 7) 72 [31] (Gleeson CJ and Crennan J).

38 *LibertyWorks* (n 2) 37–8 [96].

39 See, eg, Tushnet's description of how a few case studies can nonetheless serve a functional analysis in a comparative exercise when placed in a more general theoretical context: Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108(6) *Yale Law Journal* 1225, 1269 <https://doi.org/10.2307/797327>.

40 For the distinction between the convergence and engagement models, see Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119(1) *Harvard Law Review* 109.

41 Stephen Gageler and Will Bateman, 'Comparative Constitutional Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 261, 267–8 <https://doi.org/10.1093/law/9780198738435.003.0012>.

42 *Brown v Tasmania* (2017) 261 CLR 328, 373 [149], 374 [151] (Kiefel CJ, Bell and Keane JJ) ('*Brown v Tasmania*'), discussing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

43 The US Supreme Court's attitudes toward prior restraint have also changed over time. For example, the Roberts Court has described routinely cited federal protection against prior restraints as 'controlling': see Seth F Kreimer, 'The "Weaponized" First Amendment at the Marble Palace and the Firing Line: Reaction and Progressive Advocacy before the Roberts Court and Lower Federal Courts' (2023) 72(5) *Emory Law Journal* 1143, 1165.

44 Emerson, 'The Doctrine of Prior Restraint' (n 8) 648.

of the particular expression, but exclusively on the nature and form of governmental regulation of the expression'.[45] As such, the doctrine can invalidate restraints prior to the dissemination of speech where those restraints would otherwise be permissible after dissemination has occurred.[46] For example, the doctrine would apply to advance screening of a newspaper but not subsequent criminalisation of the content of that newspaper.[47] Prior restraint therefore carries a 'very heavy burden' of justification[48] and a 'heavy presumption' against constitutional validity.[49] In *Nebraska Press Association v Stuart*, for example, Burger CJ stated that a prior restraint is considered 'the most serious and the least tolerable infringement on First Amendment rights'.[50] While penalties are subject to protections which defer the impact of judgment, such as appellate review, a prior restraint is an 'immediate and irreversible sanction'.[51]

The scope of the doctrine of prior restraint in the US has expanded over time.[52] In *Near*, an injunction was imposed on the defendants so as to prevent them from publishing '"any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law"'.[53] Hughes CJ's majority opinion invalidated that injunction,[54] analogising it to historical licensing schemes in England.[55] Since *Near*, the rule against prior restraint has been extended to a broad range of contexts,[56] including official licensing, injunctions,[57] taxation of the press, and gag orders.[58]

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45 Redish (n 9) 53.

46 Ibid; Emerson, 'The Doctrine of Prior Restraint' (n 8) 648.

47 Emerson, 'The Doctrine of Prior Restraint' (n 8) 648.

48 *New York Times Co v United States*, 403 US 713, 731 (White J) (1971) ('*New York Times*').

49 *Organization for a Better Austin v Keefe*, 402 US 415, 419 (Burger CJ) (1971).

50 *Nebraska Press Association v Stuart*, 427 US 539, 559 (1976) ('*Nebraska Press*').

51 Ibid. However, note criticism of this point. Some restraints, such as gag orders, have no sanction until a successful charge of contempt of court for violating the order. This is similar to subsequent punishment through criminal prohibition: Stephen R Barnett, 'The Puzzle of Prior Restraint' (1977) 29(3) *Stanford Law Review* 539, 550 <https://doi.org/10.2307/1228297>. However, this is different for restraints such as preclearance, which do not vest the burden of proof in the issuer of a restraint.

52 See also the argument that the doctrine of prior restraint should be recalibrated in the digital age: Ariel L Bendor and Michal Tamir, 'Prior Restraint in the Digital Age' (2019) 27(4) *William and Mary Bill of Rights Journal* 1155.

53 *Near* (n 36) 706 (Hughes CJ for the Court).

54 Ibid 722–3.

55 Ibid 713. Butler J, dissenting, disputed that the statute was a prior restraint. His Honour considered that the Minnesota statute did not 'authorize administrative control in advance', but 'prescribes a remedy to be enforced by a suit in equity': at 735.

56 Emerson, 'The Doctrine of Prior Restraint' (n 8) 670. See also Jack M Balkin, 'Old-School/New-School Speech Regulation' (2014) 127(8) *Harvard Law Review* 2296, 2299, 2314–24. In some contexts, there are specific procedural safeguards which allow prior restraints to avoid constitutional infirmity. For example, the prior submission of a film to a censor is permitted where the burden rests on the censor to prove that the film is unprotected expression, and the censor's determination has no effect of finality: *Freedman v Maryland*, 380 US 51, 58–9 (Brennan J for the Court) (1965). See also *FW/PBS Inc v Dallas*, 493 US 215 (1990).

57 See, eg, *Tory v Cochran*, 544 US 734, 736–9 (Breyer J for the Court) (2005); Paige L Marshall, 'Defamation Dilemma: Is the First Amendment Protecting Unprotected Speech?' (2020) 53(1) *Suffolk University Law Review* 41. Separately, note the objections to preliminary injunctions in copyright infringement suits being classified as a 'prior restraint' in the absence of a limiting principle: 'First Amendment: Prior Restraints' (2016) 129(6) *Harvard Law Review* 1787, especially at 1791.

58 See, eg, Jeffries Jr (n 2) 417–19; Jeffery A Smith, 'Prior Restraint: Original Intentions and Modern Interpretations' (1987) 28(3) *William and Mary Law Review* 439, 440; Meyerson, 'Rewriting *Near*' (n 12) 1096–106; Doug Rendleman, 'The Defamation Injunction Meets the Prior Restraint Doctrine' (2019) 56(3) *San Diego Law Review* 615, 687.

However, the doctrine has also been subject to substantial criticism. For example, Jeffries Jr argues that the doctrine is 'fundamentally unintelligible', because it 'provides no coherent basis' for distinguishing between prior restraint and subsequent punishment.[59] Similarly, Redish observes that there are 'inconsistencies in the doctrine's application'.[60] Further, the effect of the doctrine is that it has often given rise to an inference that subsequent punishment is permissible.[61] For example, exclusive focus on the harms of prior restraint in *Near* suggest that invalidity could have been avoided if the legislature 'had instead made it a crime to publish such a newspaper'.[62] Another line of critique centres on the kind of analysis which the doctrine invokes. Arguably, the presumption against constitutionality is 'undiscriminating' across different kinds of prior restraint.[63] In response, Freund argues for 'a pragmatic assessment of its operation in … particular circumstances' and 'a more particularistic analysis'.[64]

Criticism has particularly been levelled at the inclusion of injunctions in the doctrine of prior restraint,[65] which, in some cases, is extrapolated into an argument that the doctrine is no longer coherent.[66] This incoherence emerges from the fact that injunctions share features of subsequent punishments, so as to call into question the categorical delineation between prior restraint and subsequent punishment which is the basis of the doctrine. Jeffries Jr argues that the application of prior restraint to injunctions is 'positively misleading'.[67] In his view, injunctions are unlike administrative preclearance because a court – which lacks a vested interest in suppression – imposes the ultimate restraint.[68] Several opposing arguments have been advanced that injunctions are inherently more prohibitive than subsequent punishment through criminal prosecution, including that an injunction is more effective at deterring speech[69] and that an injunction delays speech.[70] But Jeffries Jr contends that those harms are equally true of subsequent punishments, especially when 'it is only the possibility of *erroneous* deterrence that should be the subject of

59 Jeffries Jr (n 2) 419.

60 Redish (n 9) 53. The doctrine has also been applied more loosely: see, eg, the finding that campaign finance laws may 'function as the equivalent of prior restraint' due to regulatory complexity, while not being prior restraints 'in the strict sense of that term': *Citizens United v Federal Election Commission*, 558 US 310, 335 (Kennedy J for the Court) (2010).

61 Ibid 54. This has gone as far as Judge Richard Posner's assertion that the original understanding of the Free Speech Clause of the First Amendment prohibited prior restraints but not subsequent punishments: see Ashutosh Bhagwat, 'Posner, Blackstone, and Prior Restraints on Speech' [2015] (5) *Brigham Young University Law Review* 1151.

62 Redish (n 9) 54, citing *Near* (n 36).

63 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 13.

64 Paul A Freund, 'The Supreme Court and Civil Liberties' (1951) 4(3) *Vanderbilt Law Review* 533, 539.

65 See, eg, Owen M Fiss, *The Civil Rights Injunction* (Indiana University Press, 1978) 69–74.

66 See, eg, Jeffries Jr (n 2).

67 Ibid 433.

68 Ibid 426–7.

69 *Nebraska Press* (n 50) 559 (Burger CJ).

70 Jeffries Jr (n 2) 429–30. See also Howard O Hunter, 'Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton' (1982) 67(2) *Cornell Law Review* 283, 295. See generally Blasi, 'Toward a Theory of Prior Restraint' (n 11).

concern'.[71] Conversely, one respect in which Jeffries Jr considers that injunctions can plausibly have a greater First Amendment impact is in the 'collateral bar rule', which provides that 'the legality of an injunction may not be challenged by disobeying its terms'.[72] The effect of the collateral bar rule is to enable the government 'to suppress by injunction speech that could not be suppressed by threat of penal sanctions'.[73] Overall, Jeffries Jr rejects the 'broad and categorical condemnation of injunctions' as prior restraints, but acknowledges that they may be 'differentially destructive' of First Amendment values in some cases.[74] Conversely, Blasi has argued that injunctions can be accommodated under the doctrine of prior restraint, because licensing systems and injunctions share common characteristics.[75] Both involve adjudication in the abstract,[76] are likely to be overused compared to subsequent punishments,[77] and have an adverse impact on how audiences perceive communications due to delay or filtering.[78]

In contrast to these debates, there is also broad agreement in relation to some kinds of prior restraints. First, although critics believe that 'prior restraint' may not be a useful label for administrative preclearance (the first category of Emerson's typology), they generally recognise the justifications for hostility toward such schemes. For example, Jeffries Jr agrees with Emerson that systems of administrative preclearance are 'the most plainly objectionable'[79] and merit 'an attitude of special hostility'.[80] This is because administrative preclearance tends to capture the broadest range of expression, as 'it is the failure to obtain preclearance rather than the character of the speech itself that determines illegality'.[81] However, Jeffries Jr argues that the framework of 'overbreadth' is more informative than the invocation of prior restraint in these cases.[82] Overbreadth refers to the doctrine that 'an overbroad regulation of speech or publication may be subject to facial review and invalidation' on the basis that it is substantially beyond the scope of permissible regulation,

71 Jeffries Jr (n 2) 429 (emphasis in original). See also William T Mayton, 'Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine' (1982) 67(2) *Cornell Law Review* 245, 276.

72 Jeffries Jr (n 2) 431.

73 Ibid 432. To some extent, this rule seems to have eroded in the US over time: Barnett (n 51) 553–8. Several state courts now reject the rule, and some Supreme Court cases appear to recognise that a 'transparently invalid' order is not subject to the rule: Rendleman (n 58) 687; Barnett (n 51) 556–7. However, the rule has not been expressly overruled, so remains relevant to assessing the doctrine of prior restraint in the US: see Jeffries Jr (n 2) 432; Rendleman (n 58) 685; Smolla (n 17) 5. Further, in Australia, strict obedience to injunctions is required: see *McNair Anderson Associates Pty Ltd v Hinch* [1985] VR 309, 313 (Southwell J).

74 Jeffries Jr (n 2) 433.

75 Blasi, 'Toward a Theory of Prior Restraint' (n 11). Blasi also considered that the burden of initiative and delay may impose self-censorship costs, but they would not seem to outweigh the self-censorship risks that derive from subsequent punishment: at 47–9.

76 Ibid 49–54.

77 Ibid 54–63.

78 Ibid 63–9.

79 Jeffries Jr (n 2) 421.

80 Ibid 423.

81 Ibid 421–2.

82 Ibid 425.

'even though its application in the instant case is constitutionally unobjectionable'.[83] Second, Emerson is open to imposing a lesser burden of justification on restraints in the third and fourth categories of his typology. Although those categories do still limit expression and may be subject to the vices of the first and second categories, such vices are diluted by the fact that less individual discretion is involved. For this reason, Emerson considers that 'the strict rule of prior restraint should not apply' in respect of the third and fourth categories.[84]

The thrust of these criticisms is therefore not that the rationales underlying prior restraint are altogether irrelevant to assessments of validity. Rather, they are that prior restraint inappropriately elevates different kinds of restraints to the same 'very heavy burden' of justification,[85] irrespective of whether their characteristics justify that burden. However, and as the below Part will argue, the analytic value of prior restraint in Australia is less that it should operate as doctrine and more that it unifies principles about why certain schemes are predisposed to be burdensome. Further, it identifies kinds of burden that may otherwise be overlooked. Recognition of this value does not require that Australian courts mirror First Amendment jurisprudence.

IV PRIOR RESTRAINT IN AUSTRALIAN JURISPRUDENCE

Currently, Australian law reflects a willingness to account for the breadth of discretions in assessing validity, but does not recognise that the concept of prior restraint inherently invokes a greater degree of restrictiveness. In comparing prior restraint and subsequent punishment, it becomes clear that certain kinds of prior restraint are harmful not just because they are broad on their own face, but because they are *broader* relative to subsequent punishment and in the structure of their administration. The benefit of the Australian position is that considering whether the ideas behind the concept of prior restraint have a place in Australian law does not require wholesale importation of the US doctrine and all its doctrinal controversies. Rather, it merely requires a willingness to engage with the rationales of prior restraint to develop a more principled jurisprudence on the protection of expression in Australian law.

Accordingly, the below section considers the extent to which the concept of prior restraint is currently part of Australian law. It does so by analysing two contexts in which it has been discussed by the judiciary: first, the implied freedom of political communication; and second, interlocutory injunctions in defamation cases. As this comparison reveals, contradictions inhere in the application of the concept of prior restraint. The selective relevance of the concept generates inconsistency and a vacuum of principle in Australian doctrine. That vacuum can be addressed through attention to these considerations in evaluative exercises tailored to the Australian legal context.

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83 Ibid.
84 Emerson, 'The Doctrine of Prior Restraint' (n 8) 671.
85 *New York Times* (n 48) 731 (White J).

A Case Study Selection

The two contexts which are the focus of this section do not cover the universe of cases which invoke prior restraint considerations. Other orders or regulations may be characterised as prior restraints without being expressly labelled as such: a non-publication or suppression order is an example.[86] Where these cases intersect with the concept of prior restraint, they raise considerations similar to those invoked by interlocutory injunctions in defamation. For example, in *United Telecasters Sydney Ltd v Hardy*, Samuels AP considered that an order with characteristics of a non-publication order was essentially 'the prior restraint of a threatened contempt by the media', which was beyond the power of the District Court because an application for a prior restraint order is treated as an application for an interlocutory injunction – an order which the District Court had no power to issue.[87] The focus is therefore on two examples which exemplify judicial treatment of the concept of prior restraint in Australia, even though the concept is not limited to those contexts.

A further justification for this selection is that it is interested in the extent to which Australian courts explicitly engage with the concept of prior restraint. In the absence of that explicit engagement, it is difficult to draw inferences regarding whether the weight attributed to expression in any balancing exercise is a direct consequence of the concept of prior restraint. Consequently, as a preliminary examination of the Australian position, this section does not attempt to canvas all forms of prior restraint. Instead, it asks whether courts, in deciding those cases, have incorporated the concept in reaching their conclusions. Non-publication and suppression order cases do not systematically incorporate the concept of prior restraint in this way.[88] That being so, further work could be done on the relevance of the concept of prior restraint to other orders or regulations. The protest regulations in Part V are an example, but other contexts may be equally relevant.

One potential problem with this selection is the different legal and procedural contexts in which the two evaluative exercises arise. Arguably, differences in those contexts explain any doctrinal inconsistency. However, both evaluative exercises involve analogous uses of values-based reasoning to assess expression: whether through the latitude of the concept of inadequacy in the implied freedom,[89] or through the discretion to order an interlocutory injunction. Both also refer to the same common law precursor of the concept of prior restraint and Blackstone's castigation of English licensing laws.[90] Differences in contexts also do not explain the divisions within the Court in *LibertyWorks*, in which some members of the Court favoured the concept of prior restraint and others rejected it. That strikes at a fundamental disagreement about the value of the concept of prior restraint to analysing restraints on expression.

86 See, eg, *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68 ('*General Television*').
87 (1991) 23 NSWLR 323, 332–3 (Samuels AP).
88 See, eg, *General Television* (n 86).
89 *LibertyWorks* (n 2) 46–7 [119] (Gageler J).
90 Ibid 37–8 [96]; *O'Neill* (n 7) 72 [31] (Gleeson CJ and Crennan J).

B Prior Restraint and the Implied Freedom of Political Communication

Prior restraint was considered in a constitutional context in *LibertyWorks*. In *LibertyWorks*, the plaintiff, LibertyWorks Inc, proposed to host a Conservative Political Action Conference in Australia with the American Conservative Union.[91] A Deputy Secretary of the Attorney-General's Department observed that LibertyWorks Inc may be required to register its arrangements under the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*'),[92] which provides for 'the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals'.[93] Subsequently, LibertyWorks Inc claimed that provisions of the *FITS Act* were invalid[94] on the basis that the imposition of registration obligations with respect to communications activities infringed the implied freedom of political communication.[95] Those obligations arise from three provisions. First, item 3 of the table in section 21(1) designates a 'communications activity' as a 'registrable activity'. Second, section 18 provides that persons who undertake a registrable activity on behalf of a foreign principal become liable to register. Third, section 16 provides that a person who becomes liable to register must apply to the Secretary for registration. In considering the validity of the *FITS Act*, the concept of prior restraint was discussed by six judges of the Court.

Kiefel CJ, Keane and Gleeson JJ considered that the Act did not impose a form of 'prior restraint' upon the plaintiff's expression. Their Honours noted that the Act 'is not concerned to permit only communications allowed by the government'. Rather, 'it is concerned to ensure that the identity of the source of such political information … is known to the public and to government decision-makers'.[96] Accordingly, Kiefel CJ, Keane and Gleeson JJ defined prior restraint in the sense contemplated by the first legislative restraint in Emerson's four-part typology, being 'where the government limitation … undertakes to prevent future publication or other communication without advance approval of an executive official'.[97] But their Honours did not consider whether prior restraint might extend to other limitations. Instead, its relevance was rejected solely on this basis. Nonetheless, it is notable that this rejection of prior restraint was not a rejection of the applicability of prior restraint in all cases. By excepting the registration scheme from their definition of prior restraint, Kiefel CJ, Keane and Gleeson JJ did not discuss the general merit of the doctrine of prior restraint.

Edelman J, concurring, considered the issue of 'prior restraint' in greater depth. His Honour concluded that the regulation of registrable communications activity under the *FITS Act* 'is not analogous with the United States notion of

91 *LibertyWorks* (n 2) 11 [4] (Kiefel CJ, Keane and Gleeson JJ).
92 Ibid 12 [5].
93 *Foreign Influence Transparency Scheme Act 2018* (Cth) s 3 ('*FITS Act*').
94 *LibertyWorks* (n 2) 12 [6] (Kiefel CJ, Keane and Gleeson JJ).
95 Ibid 21 [40].
96 Ibid 24 [50].
97 Emerson, 'The Doctrine of Prior Restraint' (n 8) 655.

"prior restraint"'.[98] 'The regulation of registrable communications activity does not "forbid" such activity, nor does it restrain the activity by prohibiting its exercise without permission'.[99] The *FITS Act* does not 'directly or indirectly [empower] any form of speech to be prohibited by anyone under any conditions'.[100] Edelman J's position is similar to that of Kiefel CJ, Keane and Gleeson JJ, in that it confines the definition of prior restraint to prohibition. But it is also different in two key respects. First, Edelman J cast doubt on the doctrine of prior restraint itself, rather than solely stating that prior restraint had no relevance to the facts of the case. Second, Edelman J considered that the burden had greater depth than Kiefel CJ, Keane and Gleeson JJ. This depth emerged from the fact that the regulation of registrable communications activity constrained and deterred communication prior to, during and after the communication.[101] While rejecting the applicability of prior restraint, Edelman J qualified the depth of the burden by reference to deterrence prior to a communication. This reasoning strikes at a temporal aspect of the logic of prior restraint, but does not then consider whether the quality of being 'prior' is inherently more burdensome than restraints which occur during and after a communication. Separately, Edelman J also criticised the doctrine on the basis that it is 'a loose concept which has been said to provide "an impetus to distort doctrine in order to expand protection"'.[102] This statement is based on Jeffries Jr's criticism. It refers to 'the historic association of "prior restraint" with a declaration of constitutional invalidity', which has led courts to apply the doctrine in an incoherent manner to bring cases under the protection of the First Amendment.[103]

Conversely, the concept of prior restraint was prominent in the dissenting judgments and, particularly, in Gageler J's judgment. Gageler J stated that '[t]o be forced under pain of criminal sanction to register under a statutory scheme as a precondition to being permitted to engage in a category of political communication at all is to be subjected to a prior restraint on political communication'.[104] In his view, to be compatible with the implied freedom of political communication, a prior restraint must withstand 'close scrutiny, congruent with a search for "compelling justification"'.[105] To meet this standard, Gageler J considered that two conditions needed to be satisfied. First, the restraint must be imposed in pursuit of a compelling object that is consistent with the constitutionally prescribed system of representative and responsible government. Second, the restraint must be 'narrowly tailored to achieve that object in a manner

98 *LibertyWorks* (n 2) 84 [219].
99 Ibid 85 [219] (citations omitted).
100 Ibid.
101 Ibid.
102 Ibid 84–5 [219], quoting Jeffries Jr (n 2) 420. Notably, Jeffries Jr himself does not outright reject the concept of prior restraint, even though he is critical of it. Jeffries Jr expressly recognises the objectionability of specific types of prior restraint, such as administrative preclearance: at 421. He argues that the characteristics of administrative preclearance 'fully justify an attitude of special hostility toward preclearance requirements': at 423.
103 Jeffries Jr (n 2) 419–20.
104 *LibertyWorks* (n 2) 37 [94].
105 Ibid 40 [100], quoting *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (Gleeson CJ).

that minimally impairs freedom of political communication'.[106] The sole identified object was to improve transparency of activities undertaken on behalf of foreign principals.[107] While this represented a compelling object, Gageler J concluded that it was not narrowly tailored.[108] This was principally due to the Secretarial discretion to maintain a non-public register.[109] Similarly, Gordon J held that the *FITS Act* imposed a 'prior restraint' on communications activity which operated as a 'freeze' on political communications.[110] Even though the *FITS Act* does not impose a legal sanction on engaging in political communication, Gordon J considered that the system of registration imposed a 'significant or severe' burden[111] through demanding information and exerting deterrent pressures.[112] Although both Gageler J and Gordon J incorporated the concept of prior restraint into their judgments, their Honours also did not precisely specify the nature of the restraint imposed by the *FITS Act*. Their use of the concept of prior restraint largely rests on an assumption that prior restraint is more burdensome, but there is no subsequent analysis of whether the concept accommodates distinct standards in respect of different kinds of restraints.

The *FITS Act* seems to contemplate a mode of restraint that is analogous to the third legislative restraint in Emerson's four-part typology, being 'legislative restraints which make unlawful publication or other communication unless there has been previous compliance with specific conditions imposed by legislative act'.[113] Emerson expressly considered that laws 'requiring registration of lobbyists or of certain political organizations' are examples of such a restraint.[114] These restraints may not necessarily justify the strict rule against prior restraint that operates in respect of the first category, because the relevant restraint is not as expressly prohibitive. However, they nonetheless invoke the core considerations that justify the doctrine of prior restraint (albeit to a lesser degree).[115] While they lack the breadth of discretion that is present in the first and second categories of prior restraint, the element of preventive control which is involved in the restraint is 'an additional, but not conclusive, factor'.[116] The Court in *LibertyWorks* did not evaluate these considerations. It is clear that the concept of prior restraint is not generally well-accepted in the Australian constitutional context. Further, prior restraint is still seen as an all-encompassing concept, which is either wholly accepted or wholly dismissed.

This dichotomy is false. Considering the concept of prior restraint does not require that the doctrine be transplanted into Australian constitutional law. Given the lack of a freestanding right to freedom of expression in the *Australian Constitution*, it is appropriate that prior restraint has not been elevated to the level

106 *LibertyWorks* (n 2) 40 [100] (Gageler J).
107 Ibid 40–1 [102] (Gageler J), citing *FITS Act* (n 93) s 3.
108 *LibertyWorks* (n 2) 40 [101].
109 Ibid 42 [107].
110 Ibid 69 [179].
111 Ibid.
112 Ibid 70 [179], citing *United States v Rumely*, 345 US 41, 57 (Douglas J) (1953).
113 Emerson, 'The Doctrine of Prior Restraint' (n 8) 656.
114 Ibid.
115 Ibid 660.
116 Ibid 671.

of doctrine. The 'heavy burden' of prior restraint in First Amendment jurisprudence has no direct application to the history of the *Australian Constitution*, as evidenced by the dearth of cases on this subject in a constitutional context. But that does not mean that the principles underlying prior restraint have no operation at all. Rather, its principles may have meaningful import for evaluative exercises assessing constitutional validity.

Here, it is worth noting a divergence in the Court which maps onto different modes of assessing constitutional validity. Namely, the judges who accepted the relevance of prior restraint in *LibertyWorks* are also the strongest advocates of calibrated scrutiny as an alternative to structured proportionality. In *McCloy v New South Wales*, Gageler J observed that the 'one-size-fits all' criteria of structured proportionality are not appropriate to every law 'irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be'.[117] Gageler J and Gordon J's willingness to accept the relevance of prior restraint may reflect their view that any analysis of the implied freedom of political communication must structurally incorporate more consistency regarding the factual circumstances in which a restriction will be invalid. Such an analysis would seek to identify characteristics which will attract heightened scrutiny, such as whether a restriction is content-specific or viewpoint-discriminatory.[118]

In contrast, it may be that structured proportionality places less emphasis on context-specific factors.[119] For example, Nettle J – who favours structured proportionality – argues that calibrated scrutiny 'substitute[s] for principles of analysis capable of general application facts which in some contexts may but in others should not lead to the conclusion that an impugned law is appropriate and adapted to the achievement of a legitimate purpose'.[120] Accordingly, Nettle J considers that it is not useful to interrogate a restriction by reference to whether it is viewpoint-discriminatory or 'limited to a time, manner and place'.[121] But this does not mean that there is no role for the concept of prior restraint under structured proportionality. This is consistent with the capacity for more defined propositions to emerge within the overarching framework of structured proportionality as cases are decided over time.[122]

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117 (2015) 257 CLR 178, 235 [142] ('*McCloy*').

118 Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123, 149 <https://doi.org/10.1177/0067205X19890448>. There is some tension in the fact that a concept that figures so heavily in First Amendment jurisprudence was invoked by Gageler Jand Gordon J, given that use of American jurisprudence appears to conflict with another justification for the rejection of structured proportionality, being that the constitutional framework of Australia is distinct from rights-based constitutions which create a wider power of judicial review: see, eg, *McCloy* (n 117) 288–9 [339] (Gordon J), quoting *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178–9 [17] (Gleeson CJ).

119 See Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 93 <https://doi.org/10.1177/0067205X19890439>.

120 *Clubb v Edwards* (2019) 267 CLR 171, 263 [265] ('*Clubb*').

121 Ibid.

122 See Stone, 'Proportionality and Its Alternatives' (n 118) 152. See generally other suggestions of hybrid approaches in Dixon (n 119); Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668; Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

As such, the evaluative exercises required by structured proportionality can also import considerations of prior restraint. First, it goes toward necessity, in the sense of whether 'there are alternative, reasonably practicable, means of achieving the same object but which have a less restrictive effect'.[123] In the US, Barnett recognises that the doctrine of prior restraint 'strongly resembles' the doctrine of 'overbreadth' or 'less restrictive alternatives'.[124] Invalidity is founded on the basis that prior restraint is 'a more restrictive alternative' than subsequent punishment.[125] That analysis can be applied in the same way to prior restraints in Australia. Additionally, that analysis can compare prior restraints to other prior restraints – for example, through considering whether an alternative prior restraint may have achieved the same object but with less unfettered discretion. Second, it can affect the adequacy of balance by increasing the extent of a burden on the implied freedom, such that it is more difficult to justify by reference to the statutory purpose.[126] This is similar to Gageler J's comments in *LibertyWorks*, which recognise that a system of prior restraint may be 'more inhibiting' and encompass 'a far wider range of expression'.[127] Where those comments apply to a particular restraint, the extent of the burden is more severe.

Here, the doctrine of prior restraint can be compared to the void-for-vagueness doctrine. The Court has rejected the more rigidly 'rule-like' formulation of the void-for-vagueness doctrine in the US but acknowledges that the rationales for the doctrine may be relevant. In *Brown v Tasmania*, Kiefel CJ, Bell and Keane JJ considered that the US void-for-vagueness doctrine does not apply in Australia, so the uncertainty of laws does not in itself violate a constitutional safeguard.[128] But their Honours nonetheless considered that vagueness had relevance insofar as it formed part of the questions in *Lange*. Kiefel CJ, Bell and Keane JJ ultimately considered that the *Workplaces (Protection from Protesters) Act 2014* (Tas) was incompatible with the implied freedom of political communication, in part because of the vagueness of the boundaries of the physical area to which the Act applied.[129] This illustrates that rationales can create rules over time. This process does not even require that the specific language of 'prior restraint' is used, so long as courts recognise the relevance of 'the structure of [a law's] administration' in addition to its substance.[130]

123 *Brown v Tasmania* (n 42) 371 [139] (Kiefel CJ, Bell and Keane JJ).

124 Barnett (n 51) 543. For a description of the doctrine of overbreadth, see above n 83 and accompanying text. The doctrine of 'less restrictive alternatives' refers to the requirement that a means to accomplish a legitimate purpose should not be used if there is an alternative that is less restrictive upon an individual interest: see Robert M Bastress Jr, 'The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria' (1974) 27(5) *Vanderbilt Law Review* 971, 972.

125 Barnett (n 51) 543.

126 See *McCloy* (n 117) 218–19 [83]–[87] (French CJ, Kiefel, Bell and Keane JJ).

127 *LibertyWorks* (n 2) 37 [95] (Gageler J), quoting Emerson, *The System of Freedom of Expression* (n 10) 506.

128 *Brown v Tasmania* (n 42) 373 [148].

129 Ibid 374 [150], [152].

130 Jeffries Jr (n 2) 425.

C Prior Restraint of Publications in Defamation

In contrast, a realm in which courts have generally been willing to accept the relevance of the concept of prior restraint is in relation to interlocutory injunctions in respect of allegedly defamatory matter.

Injunctions are a 'curial remedy', issued to protect an equitable or legal right.[131] Courts have the power to issue interlocutory injunctions under broad, discretionary provisions which state, for example, that such injunctions may be granted if a judge considers it to be 'just and convenient that such order should be made'.[132] The principles relevant to making this assessment are set out in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*, in which the Court explained that the two main inquiries in the grant of an interlocutory injunction are: first, 'whether the plaintiff has made out a prima facie case, in the sense that … there is a probability that at the trial of the action the plaintiff will be held entitled to relief'; and, second, 'whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted'.[133] The concept of prior restraint arises at two points in this framework. First, the caution against equitable intervention to impose a prior restraint upon publication may mean that a prima facie case cannot be established.[134] Second, the fact that free speech is restrained by way of prior restraint is a relevant factor in the balance of convenience.[135]

In *O'Neill*, the concept of prior restraint was recognised as relevant to both of the above inquiries. The appellant in that case challenged an interlocutory injunction restraining the broadcast of a documentary imputing that the respondent was responsible for the disappearance or murder of three children.[136] Referring to Blackstone's *Commentaries* on prior restraint,[137] Gleeson CJ and Crennan J stated that 'exceptional caution' should be exercised in deciding whether to grant an interlocutory injunction in the case of defamation.[138] Their Honours held that the primary judge and the majority in the Full Court 'failed to take proper account of the significance of the value of free speech in considering the question of prior restraint of publication'.[139] In that conclusion, Gleeson CJ and Crennan J

131 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 232 [60] (Gaudron J).

132 See, eg, *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12), considered in *O'Neill* (n 7) 78 [54] (Gummow and Hayne JJ).

133 (1968) 118 CLR 618, 622–3 (Kitto, Taylor, Menzies and Owen JJ).

134 *O'Neill* (n 7) 88 [85] (Gummow and Hayne JJ).

135 Ibid 73 [32] (Gleeson CJ and Crennan J).

136 Ibid 60 [2], 65 [12].

137 Ibid 72 [31]. Other courts also cite Blackstone with approval, even if prior restraint is not key to their decisions. For example, in *Brown v Members of the Classification Review Board of the Office of Film & Literature Classification*, French J noted that '[p]rior restraint is more troublesome as Blackstone recognised': (1998) 82 FCR 225, 237.

138 *O'Neill* (n 7) 73 [32]. The Court does not exercise that same caution when the issue is a contempt of court: see *Basetec Services Pty Ltd v Leighton Contractors Pty Ltd [No 2]* (2015) 236 FCR 432, 438 [35] (White J). See also *The Registered Clubs Association of New South Wales v Stolz [No 2]* (2021) 157 ACSR 465, 491 [154]–[155] (Yates J).

139 *O'Neill* (n 7) 73 [34].

considered that the balance of convenience must account for restraints on free speech by prior restraint.[140] Gummow and Hayne JJ also noted 'the reluctance by the courts of equity to participate in any indirect reinstatement of a licensing system by a method of prior restraint by injunctive order',[141] considering that the concept of prior restraint may mean that the plaintiff's case does not appear 'sufficiently strong' to make out a prima facie case.[142] Similarly, in *Viner v Australian Building Construction Employees' and Builders Labourers' Federation [No 1]*, Northrop J quoted Lord Denning MR in *Schering Chemicals Ltd v Falkman Ltd* ('*Schering Chemicals*').[143] In *Schering Chemicals*, Lord Denning MR stated that '[n]o restraint should be placed on the press as to what they should publish … [n]ot by a licensing system … [n]or by executive direction … [n]or by court injunction'.[144] Drawing on *Schering Chemicals*, Northrop J refused an injunction against the Herald & Weekly Times.[145] The statements on prior restraint in *O'Neill* have been subsequently cited with approval.[146] Equally, the principle in *O'Neill* is not a proscription. Gleeson CJ and Crennan J expressly noted that even the adjective 'exceptional' 'does not deny the existence of a discretion'; '[i]nflexibility is not the hallmark of a jurisdiction that is to be exercised on the basis of justice and convenience'.[147]

The key question for the remainder of this section is whether *O'Neill* is specific to interlocutory injunctions in defamation, or if it should have broader import. The decision in *O'Neill* drew heavily upon English case law,[148] and specifically the leading judgment in *Bonnard v Perryman* ('*Bonnard*'), in which Lord Coleridge CJ stated that 'the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction'.[149] Courts have since reaffirmed this principle,[150] holding that it survives modern developments such as the passage of the *Human Rights Act 1998* (UK).[151] This may suggest that the apparent acceptance of prior restraint in *O'Neill* is specific

140 Ibid 73 [32].
141 Ibid 87 [82].
142 Ibid 88 [85].
143 (1981) 56 FLR 5, 26 (Northrop J) ('*Viner*'), quoting *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, 17 (Lord Denning MR) ('*Schering Chemicals*').
144 *Schering Chemicals* (n 143) 16.
145 *Viner* (n 143) 27.
146 See, eg, *Russell v S3@Raw Pty Ltd* [2023] FCA 305, [29] (Meagher J); *GG Australia Pty Ltd v Sever* [2015] FCA 1043, [30] (Griffiths J) ('*GG Australia*').
147 *O'Neill* (n 7) 67 [18]. See also *Commissioner of Police (NSW) v Field* [2016] NSWCATAP 59, [85] (Magistrate Hennessy and Senior Member Durack).
148 See, eg, *O'Neill* (n 7) 66–7 [16] (Gleeson CJ and Crennan J), 87 [82] (Gummow and Hayne JJ), citing *Thomas v Williams* (1880) 14 Ch D 864, 870–1 (Fry J); *Greene v Associated Newspapers Ltd* [2005] QB 972, 977 (Brooke LJ) ('*Greene*').
149 *Bonnard v Perryman* [1891] 2 Ch 269, 284 (Lord Coleridge CJ) ('*Bonnard*'). Notably, the decision in *Bonnard* has also been justified by reference to reasoning more specific to the context of defamation. In *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412, Sir John Donaldson MR observed that *Bonnard*, 'apart from its reference to freedom of speech, is based on the fact that the courts should not step in to defend a cause of action in defamation if they think that this is a case in which the plea of justification might, not would, succeed': at 1417–18.
150 *Fraser v Evans* [1969] 1 QB 349, 360–1 (Lord Denning MR); *Herbage v Pressdram Ltd* [1984] 1 WLR 1160, 1162 (Griffiths LJ).
151 *Greene* (n 148) 992 [66] (Brooke LJ).

to interlocutory injunctions in defamation. But there are several reasons to believe that the principle has wider relevance, centring around the fact that the rationales for 'exceptional caution' for prior restraints in defamation are not exclusive to defamation. Three reasons are cited for the standard of 'exceptional caution' set out in *Bonnard*.[152]

The first reason cited in *Bonnard* is that there is a public interest in the right of free speech. Here, it is relevant to note that the concept of 'free speech' to which the Court in *O'Neill* refers is framed in freestanding terms. Indeed, the notion of 'freedom of speech' is expressly conceptualised as a separate 'public interest' than the public interest in 'receiving information on government and political matters' emerging from *Lange*.[153] Accordingly, the interest in interlocutory injunctions is not necessarily grounded in any constitutional implication, but rather in broader social and historical principle. That principle can be relevant to any context in which free speech is a legitimate consideration in an evaluative exercise. This much is evident in the extrapolation of *O'Neill* beyond the context of defamation to interlocutory relief in other contexts, as demonstrated in *GG Australia Pty Ltd v Sever*. In that case, Griffiths J referred to *O'Neill* in considering the balance of convenience for an interlocutory injunction not involving the press.[154] Griffiths J noted that '[a]lthough those comments were directed to defamation … it seems to me that there is equally a need for caution when one is dealing with other causes of action which have some impact upon free speech'.[155] Although Griffiths J was ultimately persuaded that the balance of convenience favoured the grant of relief, his Honour noted that 'this issue has caused me perhaps greatest concern'.[156]

The second reason cited in *Bonnard* is that, until the defence of justification is resolved, it is not known whether publication of the matter would invade a legal right of the plaintiff. This justification strikes at two of the key problems with prior restraint more generally, being that it requires 'adjudication in the abstract'[157] (in that it is based on speculative harms rather than the actual eventuality of harm),[158] and that there is a propensity toward an adverse decision (as, in the absence of full argumentation on any defence, a decision-maker may more readily impose a restriction).[159]

The third reason cited in *Bonnard* is that a defence of justification is ordinarily a matter for decision by a jury and not by a judge sitting alone in an application for an injunction. This reason is somewhat specific to defamation, at least in the sense

152 *O'Neill* (n 7) 66–7 [16] (Gleeson CJ and Crennan J), citing *Bonnard* (n 149) 283–5 (Lord Coleridge CJ).
153 See, eg, *Hockey v Fairfax Media Publications Pty Ltd [No 2]* (2015) 237 FCR 127, 133 [28] (White J).
154 *GG Australia* (n 146) [30] (Griffiths J). The relevant orders related to the restraint of communications with persons associated with Gold's Gym club: at 10–11 [37].
155 Ibid 9 [31]. The considerations in *O'Neill* (n 7) are less directly relevant where the case does not involve considerations pertaining to freedom of speech: see *Australian Administration Services Pty Ltd v Korchinski* [2007] FCA 12, [6] (Stone J).
156 *GG Australia* (n 146) [32].
157 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 49.
158 Ibid; Meyerson, 'Rewriting *Near*' (n 12) 1142.
159 Emerson, 'The Doctrine of Prior Restraint' (n 8) 657.

that the policy of the law developed to favour jury trials in defamation actions.[160] But another form of this argument is that it is harmful to impose an initial decision absent the proper adjudicatory processes that would otherwise apply to subsequent punishment. That criticism can be extended to cases decided by administrative decision-makers without judicial involvement, where administrative procedures apply without the procedural guarantees of a criminal trial.[161] For cases decided by the judiciary, the considerations are somewhat different. Here, it is relevant to note the US debate on whether judicially supervised prior restraints should attract the same burden against validity.[162] Two observations suggest that there is at least reason to be cautious when judges impose prior restraints on expression. First, and as discussed in Part III above, both licensing systems (where decision-makers are administrative officials) and injunctions (where decision-makers are judges) share common characteristics, such as adjudication in the abstract,[163] overuse,[164] and adverse impact on how audiences perceive communications.[165] Second, prior restraints imposed by judges may transgress the structural role of judges as final arbiters rather than interlocutory censors.[166] As Meyerson identifies, a harm of judge-made prior restraints is that they are engaged in 'formulating or implementing rules on speech other than in [their] appropriate constitutional chronological order'[167] (ie, other than in final adjudication of a subsequent punishment).

The trajectory of the doctrine of prior restraint in American constitutional history is also instructive for why *O'Neill* is not the only context in which the concept is relevant. Restrictive licensing systems formed the genesis of the doctrine of prior restraint in First Amendment jurisprudence.[168] In early cases concerning injunctions for allegedly defamatory publications, American courts cited the equitable rule against permitting libels to be enjoined.[169] But courts subsequently recognised that the underlying principle in the context of libel extended to other areas and considered it accordingly. In the 20th century, courts began to apply the logic of prior restraint to labour disputes, striking down an order enjoining a labour union from distributing written materials[170] and refusing to enjoin a union from

160 *O'Neill* (n 7) 77 [52] (Gummow and Hayne JJ), citing *Lovell v Lewandowski* [1987] WAR 81, 91 (Kennedy J).

161 Emerson, 'The Doctrine of Prior Restraint' (n 8) 657–8.

162 See above Part III. It is interesting that, in the Australian context, the only sphere in which prior restraint has received general acceptance is the interlocutory injunction – which, in comparison to administrative preclearance, is a relatively controversial aspect of First Amendment jurisprudence.

163 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 49–54.

164 Ibid 54–63.

165 Ibid 63–9.

166 See Michael I Meyerson, 'The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers' (2001) 34(2) *Indiana Law Review* 295, 338–41 ('The Neglected History').

167 Ibid 340.

168 See generally ibid 314–22.

169 Ibid 329, citing *Howell v Bee Publishing Company*, 158 NW 358, 359 (Rose J) (Neb Sup Ct, 1916).

170 *Lindsay & Co v Montana Federation of Labor*, 96 P 127, 128 (Holloway J) (Mont Sup Ct, 1908), cited in Meyerson, 'The Neglected History' (n 166) 331.

proclaiming or conveying a boycott.[171] State courts also rejected bans on parades subject to the consent of the mayor, which made the right to communicate subject 'to an unregulated official discretion'.[172] American jurisprudence originated from licensing schemes and the law of equity but did not confine its analysis to historical antecedents in English law. Conversely, while Australian law places value on the historical contingencies which have elevated interlocutory injunctions in defamation cases, it has generally refused to recognise the concept of prior restraint in other spheres.

As the above sections evidence, the concept of prior restraint is a spectrum. It can function as doctrine, as in the US, consigning restraints to invalidity because they are structured as prior restraints. It can also refer to a loose cluster of justifications which may be variously applicable to different facts. The existence of this spectrum illustrates the key problem with current Australian consideration of this concept: incongruity. It is incongruous for Australian law to select defamation as the sole context in which prior restraint is granted a standard of 'exceptional caution', where the underlying reasons for its use extend to a broader range of contexts. Privileging defamation means that the applicability of prior restraint would attach to the breadth of evaluative criteria rather than the nature of a restraint. This effectively allows for consideration of prior restraint where there is sufficient evaluative latitude to discuss 'freedom of speech' (eg, under 'public interest' considerations, even given its absence as a federal right), but not where concepts of expression are more overt (eg, in relation to the implied freedom of political communication). This incoherence harms the capacity for courts to develop the implied freedom in a values-based manner.[173] Conversely, coherence moves toward consistent normative justifications that act as a bulwark against arbitrariness.[174] In this context, accounting for the concept of prior restraint can recalibrate the coherence of how courts think about the nature of threats to expression. By applying prior restraint analysis to protest regulation, the next Part aims to illustrate how those recalibrations might be operationalised.

V PROTEST REGULATION

Part V turns to a specific case study in prior restraint. The context of protest is an area in which First Amendment jurisprudence on prior restraint has been historically vexed, even though it 'present[s] the core danger of a prior restraint'

171 *Marx & Haas Jeans Clothing Co v Watson*, 67 SW 391 (Mo Sup Ct, 1902), cited in Meyerson, 'The Neglected History' (n 166) 332.

172 *Re Frazee*, 30 NW 72, 76 (Campbell CJ) (Mich Sup Ct, 1886). See also *Anderson v City of Wellington*, 19 P 719, 723 (Simpson C for the Court) (Kan Sup Ct, 1888).

173 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27(1) *Sydney Law Review* 29, 684 n 93 and accompanying text.

174 Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160, 1200. See generally Amalia Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and Its Role in Legal Argument* (Hart Publishing, 2015).

– being the limitation of speech prior to a judicial determination.[175] But it also presents a complex example of how prior restraint reasoning can interact with different authorisation schemes for public assemblies, which have received less attention compared to subsequent punishments of protest activities.

This Part begins by canvassing and comparing the treatment of demonstrations under First Amendment jurisprudence, and prior restraints on protest activities in Australia. It then makes two argumentative claims. First, the concept of prior restraint has constitutional significance in assessing the legitimacy of authorisation schemes. Second, the concept of prior restraint can recalibrate normative thinking about the legitimacy of authorisation, in that it clarifies the harms of involving police prior to a protest.

A The Relevance of Prior Restraint to Protest Activities in First Amendment Jurisprudence

The harms of a prior restraint on protest are similar to administrative preclearance schemes. Such structures 'may screen a range of expression far broader than that which otherwise would be brought to official attention', and suppression may be 'more likely than it would be without a preclearance requirement'.[176] As Emerson notes, '[s]tandards relating to public order in public assembly cases … cannot be reduced to precise form'.[177] The danger of these restraints is to 'leave in the hands of the administrator a wide and largely uncontrolled discretion'.[178] Further, when suppression occurs, 'the burden falls on the would-be speaker to vindicate [their] right'.[179]

Despite this, several factors related to this area of communication have been cited to justify more preventive control, including the fact that the communication takes place on public property, that available facilities are used for other purposes, and that public speech poses a greater risk to the maintenance of public order.[180] First Amendment jurisprudence reflects balancing between these factors and the burden imposed by prior restraints. In *Cox v New Hampshire* ('*Cox*'), for example, the Supreme Court upheld a system requiring advance permission to stage a parade,[181] because it provided a right to the appellants to a license for a parade 'with regard only to considerations of time, place and manner so as to conserve the public convenience'.[182] But the Court also did not endorse any and all restraints on assembly. The relevant question in each particular case is 'whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places'.[183]

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175 Redish (n 9) 84.
176 Jeffries Jr (n 2) 422.
177 Emerson, 'The Doctrine of Prior Restraint' (n 8) 671.
178 Ibid.
179 Jeffries Jr (n 2) 422.
180 Emerson, 'The Doctrine of Prior Restraint' (n 8) 664.
181 312 US 569 (1941) ('*Cox*').
182 Ibid 575–6 (Hughes CJ for the Court).
183 Ibid 574.

In *Shuttlesworth v City of Birmingham* ('*Shuttlesworth*'), the Court stated that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a licence will be unconstitutional 'without narrow, objective, and definite standards'.[184] In that case, the petitioner argued that an ordinance proscribing participation in a parade procession without a permit was discriminatorily enforced against civil rights marchers.[185] The power conferred by the ordinance in *Shuttlesworth* enabled refusal of a permit where 'the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused'.[186] In addition, several surrounding circumstances made it clear that no narrow, objective, and definite standards were followed. The Commissioner's repeated refusals made it clear to the petitioner that no permit would be granted to the petitioner under any circumstances.[187] There was no indication that the authorities considered themselves obligated to issue a permit if public convenience was not unduly disturbed.[188] As such, the Court in *Shuttlesworth* held that the ordinance was administered discriminatorily 'to deny or unwarrantedly abridge the right of assembly and … opportunities for the communication of thought', as contemplated in *Cox*.[189] In its dictum, however, the Court observed that the Supreme Court of Alabama 'performed a remarkable job of plastic surgery upon the face of the ordinance'.[190] The Supreme Court of Alabama construed the criteria for refusal not as vesting an unfettered discretion, but rather held that applications for permits must be granted if 'it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed'.[191]

The state of First Amendment jurisprudence on this subject has attracted critique. For example, Blasi considers that, together, *Cox* and *Shuttlesworth* hold that no term more specific than 'convenience' is necessary to refuse a permit. He argues that the effect of these cases is 'to give the ultimate decision-maker virtually unfettered discretion in deciding the issue of resource allocation'.[192] But these criticisms do not necessarily extend to an argument that there is no role at all for the administrative licensing of demonstrations.[193] Rather, '[t]he question is whether recognition of the constitutional dangers presented by licensing should require an adjustment in the scope of authority exercised by the licensers'.[194] For example, the bases upon which

184 394 US 147, 150–1 (Stewart J for the Court) (1969) ('*Shuttlesworth*').
185 Ibid 154. The relevance of 'unfair discrimination' was also recognised in *Cox* (n 181) 576 (Hughes CJ for the Court).
186 *Shuttlesworth* (n 184) 156 (Stewart J for the Court).
187 Ibid 158.
188 Ibid.
189 Ibid 155, quoting *Cox* (n 181) 574 (Hughes CJ for the Court).
190 *Shuttlesworth* (n 184) 153 (Stewart J for the Court).
191 Ibid 154, quoting *Shuttlesworth v City of Birmingham*, 206 So 2d 348, 352 (Lawson J for the Court) (Ala Sup Ct, 1967).
192 Vince Blasi, 'Prior Restraints on Demonstrations' (1970) 68(8) *Michigan Law Review* 1481, 1488 <https://doi.org/10.2307/1287397>.
193 For an argument that the administrative licensing of demonstrations discriminates against expressive activity, see C Edwin Baker, 'Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations' (1983) 78(5) *Northwestern University Law Review* 937.
194 Redish (n 9) 84.

permission can be denied could be limited.[195] Rather than engaging open-ended measures of 'reasonableness' and 'convenience', more precise quantifications of disruptions and losses of access could better protect protest.[196]

B Prior Restraint of Protest in Australian States and Territories

The above section presents some ways in which to evaluate restraints on protest, based on the more developed US jurisprudence in this area. The remainder of this section draws upon US thinking to consider whether analogous problems arise for Australian protest regulation.

1 Categories of Prior Restraints of Protests in Australia

Prior restraints of protests in Australia can broadly be grouped into three categories: jurisdictions where (1) prior permission by the executive is required; (2) prior authorisation is not required but provides immunity from liability; and (3) prior authorisation is not required generally.

(a) Category 1: Prior Permission by the Executive is Required

(i) Northern Territory

In the Northern Territory ('NT'), protest authorisation is regulated by council by-laws.[197] For example, the *Alice Springs (Management of Public Places) By-Laws 2009* (NT) ('*Alice Springs By-Laws*') provide that a person 'must not organise or lead a demonstration or protest in a public place without a permit'.[198] This provision is a criminal offence.[199]

The Council can grant a permit for an activity in a public place that would otherwise be unlawful.[200] The *By-Laws* do not require the Council to take certain considerations into account, or expressly provide a mechanism for judicial review of a decision to refuse a permit.

(ii) Tasmania

In Tasmania, section 49AB of the *Police Offences Act 1935* (Tas) ('*Tas Police Offences Act*') provides that a person must not organise or conduct a demonstration on a public street without a permit.[201] Contravention is punishable by a maximum penalty of a fine not exceeding 10 penalty units.[202] A permit may be issued by a

195 Ibid 85.
196 Blasi, 'Prior Restraints on Demonstrations' (n 192) 1572.
197 Local councils are vested with the power to make by-laws under section 275(1) of the *Local Government Act 2019* (NT).
198 *Alice Springs (Management of Public Places) By-laws 2009* (NT) s 33(1) ('*Alice Springs By-Laws*'). However, other by-laws do not appear to contain equivalent requirements: see, eg, *City of Darwin By-Laws 2023* (NT); *Katherine Town Council By-Laws 1998* (NT).
199 *Alice Springs By-Laws* (n 198) s 33(2).
200 Ibid ss 8(1), (3).
201 *Police Offences Act 1935* (Tas) s 49AB(1) ('*Tas Police Offences Act*').
202 Ibid.

senior police officer and any person may apply in writing for a permit.[203] Section 49AB(4) further provides:

> In determining whether or not to grant an application for a permit, a senior police officer may consider –
> (a) the safety and convenience of the public; and
> (b) the arrangements made for the safety and convenience of participants in the proposed activity; and
> (c) such other considerations as appear relevant having regard to the time and nature of the proposed activity and its location or, if applicable, its route.

The Act does not expressly provide a mechanism for judicial review of a decision to refuse a permit.

(b) Category 2: Prior Authorisation is Not Required but Provides Immunity from Liability

(i) New South Wales

In New South Wales ('NSW'), public assemblies are regulated by part 4 of the *Summary Offences Act 1988* (NSW) ('*NSW Summary Offences Act*'). Section 23 provides that a public assembly is an 'authorised public assembly' if a notice of intention to hold the public assembly has been served on the Commissioner of Police.[204] A person is not guilty of any offence relating to participating in a public assembly if it is authorised.[205]

If the notice is served seven days or more before the proposed date of the public assembly, the Commissioner may apply to a Court for an order prohibiting the holding of the public assembly.[206] The Commissioner cannot apply for the order unless the Commissioner has invited the organiser to confer and has taken into consideration any matters or representations put by the organiser.[207] If the notice is served less than seven days before the proposed date of the public assembly and the Commissioner has not notified the organiser that the Commissioner does not oppose the holding of the public assembly, the organiser may apply to a Court for an order authorising the holding of the public assembly.[208] As such, authorisation can be secured by notified non-opposition by the Commissioner, the absence of an order prohibiting the public assembly or a court order authorising the public assembly.[209] A Court's decision on an application is final.[210]

Police officers are not authorised to issue move-on directions in relation to 'an apparently genuine demonstration or protest', 'a procession', or 'an organised

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203 Ibid s 49AB(2).
204 *Summary Offences Act 1988* (NSW) s 23(1) ('*NSW Summary Offences Act*').
205 Ibid s 24. See also the overview of the NSW regime in Jeffrey Gordon, 'Protest Before and During a Pandemic' (2022) 50(4) *Federal Law Review* 421, 428–31 <https://doi.org/10.1177/0067205X221126557>.
206 *NSW Summary Offences Act* (n 204) s 25.
207 Ibid s 25(2).
208 Ibid s 26.
209 *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186, 190–1 [17] (Bathurst CJ, Bell P and Leeming JA) ('*Bassi NSWCA*').
210 *NSW Summary Offences Act* (n 204) s 27(2).

assembly'.[211] However, police officers can issue move-on directions for such demonstrations, protests, processions or assemblies to deal with 'a serious risk to the safety of the person to whom the direction is given or to any other person', or if no authorisation has been provided by part 4 of the *NSW Summary Offences Act*.[212] These exceptions were introduced by the *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW).[213]

(ii) South Australia

In South Australia ('SA'), protesters may serve a notice of assembly on the Chief Secretary, Commissioner of Police or the clerk of the council for an area in which an assembly is to be held.[214] An objection may be made to any proposal on the ground that it would 'unduly prejudice any public interest'.[215] Where an objection has been made, any person who desires to participate in the proposed assembly may make an application to a Judge for a determination.[216] The Judge may quash the objection and approve the proposal or approve any other proposals submitted to them.[217] If the conduct of an assembly conforms with approved proposals, then participating persons will be exempted from liability under laws regulating the movement of traffic or pedestrians, or obstruction of a public place. [218]

(iii) Queensland

In Queensland, authorisation is not strictly necessary for a public assembly to proceed. The *Peaceful Assembly Act 1992* (Qld) establishes the right to assemble peacefully with others in a public place.[219] However, the right can be limited as is 'necessary and reasonable in a democratic society in the interests of: (a) public safety; or (b) public order; or (c) the protection of the rights and freedoms of other persons'.[220] This framework is also reflected in the objects of the Act.[221]

The Act also includes an authorisation mechanism. Section 7 provides that a public assembly is an 'authorised public assembly' if a notice of intention is given to hold the assembly, and the assembly is taken to be approved. If a public assembly is authorised, peaceful and held substantially in accordance with the particulars and conditions of the assembly notice, then a person who participates in the assembly will not incur any civil or criminal liability for obstructing a public place merely

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211 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 200(2) ('*NSW Law Enforcement Act*').
212 Ibid ss 200(3)–(4).
213 See also Luke McNamara and Julia Quilter, 'Criminalising Protest through the Expansion of Police "Move-On" Powers: A Case Study from Australia' (2019) 58 *International Journal of Law, Crime and Justice* 22, 29–30 <https://doi.org/10.1016/j.ijlcj.2019.07.001>.
214 *Public Assemblies Act 1972* (SA) ss 4(1), (4) ('*SA Public Assembles Act*').
215 Ibid s 4(6).
216 Ibid s 5.
217 Ibid s 5(2).
218 Ibid s 6.
219 *Peaceful Assembly Act 1992* (Qld) s 5 ('*Qld Peaceful Assembly Act*').
220 Ibid s 5(2).
221 Ibid s 2.

because of their participation.[222] Queensland Police also does not have the power to issue a move-on direction for an authorised public assembly.[223] The Magistrates Court has a role in determining two kinds of applications. First, the Commissioner may apply to the Magistrates Court for an order refusing to authorise the holding of the public assembly if an assembly notice is given to the Commissioner not less than five business days before the proposed date of the assembly,[224] but only if:

(a) the relevant authority has had regard to the objects of this Act; and
(b) the relevant authority has formed the opinion, on reasonable grounds, that if the assembly were to be held –
  (i) the safety of persons would be placed in jeopardy; or
  (ii) serious public disorder would be likely to happen; or
  (iii) the rights and freedoms of persons would be likely to be excessively interfered with; and
(c) the relevant authority has consulted, or attempted to consult, with each person, body, or agency, (an interested person) with which the relevant authority would be required to consult under section 11(4) for the purposes of section 11(2)(c); and
(d) a mediation process has been engaged in and the process has ended.[225]

Second, the organiser of an assembly can apply for an order authorising the holding of the assembly if a notice is given less than five business days before the proposed date of the assembly,[226] but only if the relevant authority has not notified the organiser in writing that the relevant authority does not oppose the holding of the assembly, and a mediation process has been engaged in and the process has ended.[227] In determining an application, a Magistrates Court must have regard to the objects of the Act.[228]

(iv) Western Australia

In Western Australia ('WA'), a person who wishes to hold a public meeting or conduct a procession may give written notice to the Commissioner of Police applying for the grant of a permit.[229] The Commissioner or authorised officer may grant or refuse the permit,[230] but must not refuse the permit unless they have reasonable grounds for apprehending that the proposed public meeting or procession may:

(a) occasion serious public disorder, or damage to public or private property;
(b) create a public nuisance;
(c) give rise in any street to an obstruction that is too great or too prolonged in the circumstances; or
(d) place the safety of any person in jeopardy.[231]

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222 Ibid s 6.
223 *Police Powers and Responsibilities Act 2000* (Qld) s 45.
224 *Qld Peaceful Assembly Act* (n 219) s 12.
225 Ibid s 13(1).
226 Ibid s 14.
227 Ibid ss 15 (1)–(3).
228 Ibid s 16(2)(a).
229 *Public Order in Streets Act 1984* (WA) s 5(1) ('*WA Public Order in Streets Act*').
230 Ibid s 7(1).
231 Ibid s 7(2).

Where a notice applying for a permit is given not less than four days before the date of the proposed meeting or procession, and the person giving a notice is refused a permit or aggrieved by a condition or the way the application has been dealt with, they may apply to the State Administrative Tribunal for a review of the refusal.[232]

A person participating in a public meeting or procession which substantially conforms with the terms of the permit is not guilty of an offence relating to the movement of traffic or pedestrians, or relating to the obstruction of a street.[233] The Commissioner of Police also may not give instructions relating to regulating traffic, preventing or removing obstruction to traffic, or maintaining order in the streets for the purpose of frustrating the holding of a meeting or procession authorised under a permit.[234]

(c) Category 3: Prior Authorisation is Not Required Generally

In the Australian Capital Territory ('ACT')[235] and Victoria,[236] formal approval is not required to conduct a protest or demonstration generally. Both jurisdictions legislatively enshrine the right to peaceful assembly.[237] However, certain kinds of protests are subject to restrictions. In Victoria, for example, the *Unlawful Assemblies and Processions Act 1958* (Vic) prohibits assemblies where participants carry firearms or offensive weapons or exhibit flags or symbols which may provoke animosity.[238] The ACT also only permits protests in parliamentary precincts in authorised areas.[239]

2 Comparison of Jurisdictions

(a) Category 1 and Category 2

Based on the above review of legislation, only Tasmania and the NT (specifically, the Alice Springs Town Council) expressly criminalise demonstration in the absence of a permit.[240] In all other jurisdictions with authorisation schemes, the absence of an authorisation will mean that protesters may be subject to prosecution for offences relating to, for example, the obstruction of public places, but the absence of an authorisation is not the basis of an offence in and of itself.

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232 Ibid s 8(1).

233 Ibid s 4(1).

234 Ibid ss 9A(1)–(2).

235 However, the erection of structures in relation to a protest or demonstration will require approval: *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) s 12(1); National Capital Authority, 'The Right to Protest' (Guidelines) 3–7 <https://www.nca.gov.au/events/right-protest#>.

236 See, eg, 'Public Assemblies, Demonstrations and Rallies', *City of Melbourne* (Web Page) <https://www.melbourne.vic.gov.au/community/organising-events/Pages/public-assemblies-demonstrations-rallies.aspx>. Notification is preferred to facilitate planning for impacts to public places.

237 *Human Rights Act 2004* (ACT) s 15(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16(1).

238 *Unlawful Assemblies and Processions Act 1958* (Vic) s 10.

239 Department of Parliamentary Services, Parliament of Australia, 'APH Protests and Other Assemblies in the Parliamentary Precincts Policy' (Policy, 2 June 2022) 4 [21].

240 *Alice Springs By-Laws* (n 198) s 33; *Tas Police Offences Act* (n 201) s 49AB(1).

Accordingly, the permit schemes in Tasmania and Alice Springs are prohibitive, and engage the most severe category of prior restraint – 'where the government limitation … undertakes to prevent future publication or other communication without advance approval of an executive official'.[241] This form of restraint is the most similar to official licensing cases in the US, as it makes the legality of protest action dependent not on the 'character of the speech',[242] 'but on the presence or absence of prior permission'.[243] Suppression of this nature may never reach the courts, meaning that it may invalidate speech that would otherwise have been ruled permissible.[244]

The harms of prior restraint are also more pronounced where more power is concentrated in one branch of government. In Tasmania and Alice Springs, no mechanism for judicial review is expressly legislated in the *Tas Police Offences Act* or *Alice Springs By-Laws*. In contrast, in jurisdictions with authorisation schemes, both the executive and the judiciary are involved in deciding upon an authorisation. For example, the Commissioner of Police in NSW must make an application to a court for an order prohibiting the holding of a public assembly.[245] Equally, in SA, an application to a judge may be made for a determination as to whether an objection to an assembly should be quashed or upheld.[246] Accordingly, Category 1 schemes are more restrictive than Category 2 authorisation schemes in NSW, SA, Queensland and WA.

(b) Category 2

Of the jurisdictions where the absence of prior authorisation is not criminal, NSW legislation is framed in the most severe terms, suggesting that an application can lead to the 'prohibition' of the public assembly through court order.[247] Contrary to the implication of this language, the statute 'does not, in fact, empower the court to prohibit the public assembly'.[248] At best, it denies immunity.[249]

In SA, however, there is a possibility that protests may be further conditionalised by the approval by a judge of another proposal submitted to them before or at the hearing of an application.[250] Under other schemes in Queensland and WA, courts[251]

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241 Emerson, 'The Doctrine of Prior Restraint' (n 8) 655.
242 Jeffries Jr (n 2) 421–2.
243 Ibid 418.
244 Ibid 425.
245 *NSW Summary Offences Act* (n 204) s 25.
246 *SA Public Assemblies Act* (n 214) s 5.
247 *NSW Summary Offences Act* (n 204) s 25.
248 Gordon (n 205) 431. However, note the interaction with section 545C of the *Crimes Act 1900* (NSW) ('*NSW Crimes Act*'), which criminalises knowingly joining or continuing in an unlawful assembly. There is historical precedent for police arresting and charging participants of unauthorised protests – the experience of Women Against Rape demonstrators in Sydney in 1983 is illustrative: Robin Handley, 'The Right of Peaceful Assembly in the ACT' (Occasional Paper No 8, February 1985) 79–80.
249 Gordon (n 205) 431.
250 *SA Public Assemblies Act* (n 214) s 5(2)(b).
251 Or, in Western Australia, the State Administrative Tribunal: *WA Public Order in Streets Act* (n 229) s 8(1).

only adjudicate upon the decision to grant or refuse authorisations or permits. However, conditions may apply to the holding of the assembly.[252]

Several comments can be made about these jurisdictions through a prior restraint analysis. Centrally, the considerations which may form the basis of an objection by the Commissioner of Police are generally broader than the constituent elements of any offence that could apply after the fact and represent 'broad discretion … left in the hands of executive officials'.[253] This is particularly the case in NSW and SA, where the relevant legislation does not provide for specific circumstances in which authorisation may be refused. Such circumstances are either omitted entirely (in NSW) or framed using the expansive term 'unduly prejudice any public interest' (in SA).[254] In contrast, corresponding forms of subsequent punishment are more specific. For example, for an obstruction offence to be made out in NSW, the prosecution would need to prove wilful prevention of free passage and the absence of a 'reasonable excuse'.[255] Simultaneously, authorisation also vests power in police to determine the legitimacy of protest. It emphasises the calculus for assessing whether to authorise a protest, rather than the calculus for deciding whether to proceed with civil or criminal proceedings against a protester.

In comparison to NSW and SA, other jurisdictions impose narrower considerations. In Queensland, for example, an authorisation can only be refused if it is reasonably necessary to protect 'public safety', 'public order', or 'the protection of the rights and freedoms of other persons'.[256] As Jeffries Jr argues, preclearance problems are likely to be less troublesome if executive discretion is more controlled.[257] However, capacious concepts of 'safety' and 'order' also import discretion. This echoes Blasi's concern in the US context that terms as broad as 'convenience' provide 'unfettered' discretion regarding resource allocation,[258] and his broader argument that such restrictions must be more narrowly defined.[259]

Another mode of restrictiveness relates to legislation which places the burden on protesters to challenge the refusal of an authorisation through judicial review, rather than on the executive to apply for a refusal. The effect of such a system is to raise the barrier of entry for accessing review by a second branch of government, thereby concentrating power in the executive. For example, in WA, a person aggrieved by the Commissioner's decision can apply for review,[260] but the

252 See, eg, *Qld Peaceful Assembly Act* (n 219) s 12(3)(b); *WA Public Order in Streets Act* (n 229) s 7(1)(a)(ii). See also *SA Public Assemblies Act* (n 214) s 5.

253 Jeffries Jr (n 2) 423. See also Gordon's discussion of judicial failure 'to give real content to freedom of speech, and its consequent failure to justify conditions for postponement or deferral of a public assembly': Gordon (n 205) 433.

254 *SA Public Assemblies Act* (n 214) s 4(6).

255 See, eg, *NSW Summary Offences Act* (n 204) s 6. See also *Summary Offences Act 1953* (SA) s 58.

256 *Qld Peaceful Assembly Act* (n 219) s 5(2).

257 Jeffries Jr (n 2) 423.

258 Blasi, 'Prior Restraints on Demonstrations' (n 192) 1488.

259 See generally Blasi, 'Prior Restraints on Demonstrations' (n 192). Applying this to NSW, see Gordon (n 205) 445.

260 *WA Public Order in Streets Act* (n 229) s 8(1).

Commissioner is not required to apply to a court for an order to refuse the permit. Instead, a refusal can occur entirely through administrative decision-making.[261]

(c) Category 2 and Category 3

Comparison becomes more complex when the schemes in NSW, SA, Queensland and WA are compared to the absence of similar schemes in Victoria and the ACT. It is possible to advance an argument that the availability of immunity under authorisation schemes is ultimately more beneficial to protesters compared to jurisdictions in which no formal approval is required, as protesters may be uncertain of their vulnerability to civil or criminal liability in the latter case. In *Commissioner of Police (NSW) v Gibson* ('*Gibson*'), for example, the Attorney-General submitted that the purpose of part 4 of the *NSW Summary Offences Act* is 'to allow certain public assemblies to be held without fear of liability'.[262] However, a prior restraint analysis reveals relative burdens on expression.

First, the authorisation schemes can be more dangerous than the absence of a scheme because of the availability of more prohibitive mechanisms through court order.[263] Prohibition through these means represents a core concern of prior restraint: that communication will be prohibited based on speculative harms rather than their actual eventuality.[264] No equivalent mechanism for prohibition applies in jurisdictions without authorisation schemes.

Second, even if authorisation is granted, and immunity is extended, the Commissioner has greater power at a preliminary stage to impose conditions or limitations on the protest in some jurisdictions.[265] This vests greater power in the executive to define the terms of a protest, even if the protest would not be criminal absent those conditions or limitations. Conditions may also impose time and place restrictions that deprive the protest of its effectiveness.[266] Prior restraints amplify the harms of delay, because such restraints provide 'an authoritative adjudication regarding the legality of a disputed communication before the moment of its initial dissemination'.[267] As Blasi identifies, both injunctions and administrative licensing schemes are harmful because they have an adverse impact on how audiences perceive communications due to delay, and may impair the extent to which a speaker is able to disseminate a message.[268] Australian courts have generally avoided treating this as a harm. For example, in *Commissioner of Police (NSW) v Bassi*, Fagan J stated that the Public Health Order did not extinguish rights to assembly and expression of political opinion, but rather 'deferred' those

261 Ibid s 7(1)(b).
262 *Commissioner of Police (NSW) v Gibson* [2020] NSWSC 953, [20] (Ierace J) ('*Gibson*').
263 See, eg, *NSW Summary Offences Act* (n 204) s 25.
264 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 49; Meyerson, 'Rewriting *Near*' (n 12) 1142.
265 See, eg, *Qld Peaceful Assembly Act* (n 219) s 12(3)(b); *WA Public Order in Streets Act* (n 229) s 7(1)(a)(ii).
266 See Valerie Tarzian, 'Parades and Protest Demonstrations: Punctual Judicial Review of Prior Restraints on First Amendment Liberties' (1969) 45(1) *Indiana Law Journal* 114, 121.
267 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 64.
268 Ibid 63–9.

rights.[269] Even though determinations may legitimately account for public health considerations, the time-sensitive nature of the Black Lives Matter protests created a harm in delay that should have been weighed against those considerations.

Authorisation schemes also affect police move-on powers.[270] Authorisation can prevent the use of move-on powers in some circumstances; a lack of authorisation provides no such immunity.[271] A refusal of authorisation therefore also buttresses the use of move-on powers. As McNamara and Quilter have argued, the broad discretions involved in move-on powers allow police to unilaterally determine that a protest is 'unacceptable'.[272] The relationship between authorisation and move-on powers vests greater power in police in the absence of compliance with an authorisation scheme.

It is also relevant to note that Victoria and the ACT do not foreclose engagement with authorities because no authorisations are required. For example, the National Capital Authority states that it may be in protesters' interests to discuss plans with relevant authorities, and that authorities can provide advice on safety and security matters, and traffic control and management.[273] In that sense, an option for negotiation is available in those jurisdictions, but is not attached to conditionalisation.

C Authorisation and the Implied Freedom of Political Communication

As the above section demonstrates, differing characteristics of prior restraints on protests restrict expression to varying degrees. These characteristics may be relevant to the implied freedom of political communication.

1 Challenges to Authorisation Schemes

Courts have previously held that authorisation schemes are consistent with the implied freedom of political communication. In *Gibson*, both parties agreed that the *NSW Summary Offences Act* imposed a burden on the implied freedom, but that the purpose of the law was legitimate and suitable, 'in the sense that it is rationally connected to the purpose of allowing certain public assemblies to take place without sanction and prohibit others from taking place'.[274] However, necessity and adequacy of balance were contested by the defendant.[275] In considering this issue, Ierace J held that the law was necessary because there was no reasonably practical alternative to the mechanisms in the *NSW Summary Offences Act* which required parties to attempt to resolve the Commissioner's concerns and gave the

269 *Commissioner of Police (NSW) v Bassi* [2020] NSWSC 710, [31]. This decision was ultimately overturned, but on narrower grounds in relation to whether a notice had been given: *Bassi NSWCA* (n 209). See also *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727, [42] (Walton J).

270 This comparison is particularly stark in relation to Victoria, where additional grounds for the use of move-on powers were repealed in 2015: *Summary Offences Amendment (Move-On Laws) Act 2015* (Vic).

271 See, eg, *NSW Law Enforcement Act* (n 211) s 200(2).

272 McNamara and Quilter (n 213) 30.

273 'The Right to Protest' (n 235).

274 *Gibson* (n 262) [21] (Ierace J).

275 Ibid.

Court discretion to decide on authorisation. Ierace J also held that the law was adequate in its balance, 'as it allows the Court to take into account a wide range of considerations and to limit the restriction imposed on the implied freedom where free speech and political communication considerations prevail over others'.[276] In his view, this interpretation of the legislation was borne out by other cases concerning the authorisation of political protests in the context of the COVID-19 pandemic, in which the Court undertook this balancing exercise, emphasised the importance of public assembly and free speech, and decided to not grant a prohibition order.[277] As such, the defendant's argument about unconstitutionality was not established, given '[t]he range of outcomes available in the exercise of the discretion contained in the provision, and the balancing exercise required by it'.[278]

Despite *Gibson*, prior restraint analysis suggests that authorisation schemes should be subject to greater caution. One application of prior restraint is in challenging the validity of authorisation schemes themselves. As discussed in Part IV(A), prior restraint analysis may be relevant to the extent that it forms part of necessity and adequacy of balance.

(a) Necessity

Under necessity analysis, Part V(B)(2) demonstrates several possible arguments for less restrictive alternatives.[279] Each Category 2 jurisdiction with an authorisation scheme is less restrictive than the Category 1 permit regimes in Tasmania and Alice Springs. And each Category 3 jurisdiction without an authorisation scheme is less restrictive than both Category 1 and Category 2 jurisdictions.

There are also several ways in which the design of a permit or authorisation scheme can be less restrictive. First, the basis for refusing a permit or authorisation can be narrowed. This can be achieved through limiting police discretion to refuse through language such as '[t]he Commissioner or an authorised officer shall not refuse to grant a permit … unless' (in WA)[280] or '[t]he relevant authority is not entitled to apply for an order under section 12 unless' (in Queensland).[281] It can also target the criteria for refusal through greater particularity, replacing concepts such as 'public interest'[282] with more specific considerations. Second, the burden can be placed on the Commissioner to initiate an application for refusal in the courts, as is the case in NSW.[283]

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276 Ibid [22].
277 See, eg, *Commissioner of Police (NSW) v Gray* [2020] NSWSC 867.
278 *Gibson* (n 262) [25] (Ierace J).
279 The High Court has noted that it may not always be helpful to refer to schemes in other jurisdictions as 'obvious and compelling' alternatives, because they may all fall within the latitude of parliamentary choice: *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, 692 [182] (Gordon J), 705 [261] (Edelman J). Nonetheless, reference to these jurisdictions is useful to test the boundaries of that latitude.
280 *WA Public Order in Streets Act* (n 229) s 7(2).
281 *Qld Peaceful Assembly Act* (n 219) s 13(1).
282 *SA Public Assemblies Act* (n 214) s 4(6).
283 *NSW Summary Offences Act* (n 204) s 25.

(b) Adequacy of Balance

Prior restraints increase the extent of a burden on the implied freedom, which subsequently affects adequacy of balance.

In Tasmania and Alice Springs, permit schemes create criminal consequences for protests if permit requirements are not met. A prohibition of this nature is particularly broad in that it applies to all protests, regardless of subject matter or risk.[284] Even in Tasmania, where 'safety and convenience'[285] are relevant to the determination of whether to grant an application for a permit, the fact that a criminal penalty attaches to the lack of a permit may suggest that the scheme is overbroad relative to its purpose. This is because even protests which would otherwise uphold 'safety and convenience' can be criminalised if they contravene the permit requirement. Similarly, in Category 2 jurisdictions where authorisation is relevant, the design of prior restraints may also increase the extent of their burden due to the breadth of considerations permitting the refusal of authorisation. Nebulous bases for refusal such as 'public interest' mean that the authorisation scheme captures 'a far wider range of expression'.[286]

This position is complicated by the fact of judicial involvement in some authorisation schemes. In *Gibson*, for example, Ierace J interpreted the width of the considerations vested in the Court under NSW legislation as favourable to the law's adequacy.[287] This represents a view that the breadth of these considerations is constitutionally legitimised through judicial oversight. However, prior restraint analysis indicates that the role of the judge can also be questioned. Defamation and the finding in *O'Neill* illustrate why judges are not immune to the harms of prior restraint. In such contexts, the role of the judge as licensor is 'substantially enhanced'.[288] Like the executive, judges that rule on authorisations also tend to adjudicate in the abstract[289] and overuse prohibitions.[290]

2 Considerations under Authorisation Schemes

Even if these schemes are ultimately constitutional, the concept of prior restraint is also relevant to judicial decision-making in the authorisation process. As Ierace J contended, authorisation schemes allow the Court to consider 'the implied freedom where free speech and political communication considerations prevail over others'.[291] The concept of prior restraint is relevant to free speech and political communication considerations.[292] Specifically, it increases the importance of those

284 Cf *Clubb* (n 120) 209 [100] (Kiefel CJ, Bell and Keane JJ).
285 *Tas Police Offences Act* (n 201) s 49AB(4).
286 *LibertyWorks* (n 2) 37 [95] (Gageler J), quoting Emerson, *The System of Freedom of Expression* (n 10) 506.
287 *Gibson* (n 262) [22].
288 Hunter (n 70) 287.
289 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 49–54.
290 Ibid 54–63.
291 *Gibson* (n 262) [22].
292 See above Parts IV(A)–(B), V(C).

considerations by posing a greater threat to protected interests and increasing the restrictiveness of the restraint being adjudged.

3 Challenges to Subsequent Punishments

The nature of authorisation schemes also has effects on the constitutionality of subsequent punishments. In *Kvelde v New South Wales*, for example, Walton J considered a challenge to section 214A of the *Crimes Act 1900* (NSW), which criminalises damage or disruption to major facilities.[293] Walton J considered that section 24 of the *NSW Summary Offences Act* did not provide a means of reducing the burden imposed by section 214A. In part, this was because section 24 'only operates if the Commissioner does not oppose the public assembly'.[294] Further, the requirement to provide notice and apply for authorisation prior to the protest meant that the provision '[did] not accommodate spontaneous protests or protests undertaken with urgency'.[295] Through operating as prior restraints, authorisation schemes can fail to uphold particular classes of urgent protest, and so do not mitigate the burdens imposed by subsequent punishments.

D Authorisation and Negotiated Management

In principle, protest policing in Australia claims to proceed under a 'negotiated management' model.[296] Characteristics of 'negotiated management' include 'communication between police and protesters prior to and during protest' and 'minimum use of force in protecting persons and property'.[297] However, negotiation can also '[impose] limits on and [exert] control over protest movements'.[298] Unlike penalisation, preventive policing of protests 'denies any chance for citizens to express their grievance through a legitimate form of political participation'.[299] It 'restricts protest irrespective of the likelihood that it will entail [aggressive or violent] conduct'.[300]

Prior restraint considerations highlight the harms of negotiated management, where excessive power is concentrated in the executive. As Martin identifies, negotiation can be particularly controlling if police fail to engage with protest organisers in good faith and adopt narrow approaches to authorisation.[301] Prior

293 *Kvelde v New South Wales* [2023] NSWSC 1560, [10] (Walton J).
294 Ibid [276].
295 Ibid [281].
296 Greg Martin, 'Protest, Policing and Law during COVID-19: On the Legality of Mass Gatherings in a Health Crisis' (2021) 46(4) *Alternative Law Journal* 275, 276 ('Protest, Policing and Law') <https://doi.org/10.1177/1037969X211029963>, citing Greg Martin, 'Showcasing Security: The Politics of Policing Space at the 2007 Sydney APEC Meeting' (2011) 21(1) *Policing and Society* 27 <https://doi.org/10.1080/10439463.2010.540659>; Alex S Vitale, 'From Negotiated Management to Command and Control: How the New York Police Department Polices Protests' (2005) 15(3) *Policing and Society* 283 <https://doi.org/10.1080/10439460500168592>.
297 William Smith, 'Policing, Protest, and Rights' (2018) 32(3) *Public Affairs Quarterly* 185, 186 <https://doi.org/10.2307/26909993>.
298 Ibid 196.
299 Ibid 191.
300 Ibid 188.
301 Martin, 'Protest, Policing and Law' (n 296) 279.

restraint provides additional analysis: narrowness is not only a product of bad faith. Rather, a structure of prior authorisation predisposes police toward narrowness. That predisposition is built into legislative schemes and compounds any bad faith or individual conservatism. A system of prior restraint is 'so constructed as to make it easier, and hence more likely' that an official will rule adversely to free expression.[302] Subsequent punishment imports considerations of resourcing, including the 'time, funds, energy, and personnel' necessary to pursue prosecution, and the effects of such a prosecution on the accused.[303] Prior restraints operate at a stage in which analogous considerations have not yet arisen. Further, that narrowness is systemic and institutionalised, and does not solely attach to decisions in particular cases. A predisposition toward narrowness can become enshrined in a policy to impose prior restraints in all cases with similar fact patterns. During COVID-19, the Commissioner of Police (NSW) provided an interview on Sydney Radio 2GB, expressing that instructions had been provided to take the application for authorisation in *Gibson* to the Supreme Court, as had been the practice for other matters.[304] This indicates that the lodgement of Notices of Intention became 'a deliberate policy approach'.[305] This approach was at odds with the fact that '[d]ifferent considerations … must apply to every different application, including any change or developments … about relevant current health risks'.[306]

Prior restraint also interacts with systems of subsequent punishment. When multiple forms of regulation are used to target the same activity, collusive effects may emerge. A slate of recent legislation has sought to prohibit specific protest tactics by expanding offences and increasing penalties for existing offences.[307] Each of these laws are forms of subsequent punishment which impose penalties on protest activity in the event of contravention. The dual operation of prior restraint and subsequent punishment in protest regulation illustrates the interdependency of prospective and retrospective regulatory mechanisms. Subsequent punishment can operate upon consent to a negotiated management model so that a prior restraint takes on a more prohibitive character. In states and territories which establish authorisation mechanisms, prohibitive or punitive legislation increases the risk of holding an unauthorised assembly. This greater risk compels engagement with authorisation schemes, even where that engagement is not strictly necessary, thereby bringing more protests into the ambit of a prior restraint.

Compliance with a prior restraint is also mapped onto lawfulness, even though there is no basis for that association in jurisdictions which do not require permits.

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302 Emerson, 'The Doctrine of Prior Restraint' (n 8) 657.

303 Ibid.

304 *Gibson* (n 262) [32] (Ierace J).

305 Louise Boon-Kuo et al, 'Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic' (2021) 33(1) *Current Issues in Criminal Justice* 76, 82 <https://doi.org/10.1080/10345329.2020.1850144>.

306 *Commissioner of Police (NSW) v Kumar* [2020] NSWSC 804, [57] (Lonergan J).

307 *Roads and Crimes Legislation Amendment Act 2022* (NSW); *Summary Offences and Other Legislation Amendment Act 2019* (Qld); *Summary Offences (Obstruction of Public Places) Amendment Act 2023* (SA); *Police Offences Amendment (Workplace Protection) Act 2022* (Tas); *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic).

For example, the NSW legislature discursively constructs an association between prior restraint and subsequent punishment by equating the 'unauthorised' protest with the 'unlawful' protest. In his second reading speech for the Roads and Crimes Legislation Amendment Bill 2022 (NSW), Attorney-General Mark Speakman emphasised the distinction between 'authorised' and 'unauthorised' protest. Speakman stated that part 4 of the *NSW Summary Offences Act* 'contains a scheme to facilitate lawful protests under which the commissioner of police, the Supreme Court or the District Court can authorise a protest'. He also stated that '[t]he scheme encourages cooperation between police and protest organisers' and 'seeks to strike a balance between the freedom of assembly and speech of protesters, on the one hand, and the rights of other members of the public not to have their lawful activity impeded, on the other hand'.[308] Speakman then distinguished protests of the kind which motivated the passage of the Bill, stating that '[p]rotests such as those that occurred in Port Botany were not authorised under the *Summary Offences Act*'.[309] These statements associate the absence of authorisation with unlawfulness and the impetus for increased penalties. But acts which are 'lawful' are not the same as assemblies which are 'authorised'. The authorisation is available for all assemblies. The result of authorisation is to immunise participants from criminal liability for participation.[310] In NSW, an unauthorised assembly is not necessarily unlawful.[311] Even though protesters may be prosecuted after the fact, the lawfulness of those actions is not the same as the lawfulness of the protest. Altogether, these associations further displace consent to the negotiated management model even when protests are non-disruptive. Cooperation between police and protest organisers is not 'encouraged'; rather, compliance with the authorisation scheme is backed by threat of sanction. Further, prohibition orders in NSW have been used as 'a practical passport for police' to exercise police powers in an unfettered manner.[312] The existence of a prohibition order is invoked to justify forceful dispersal, despite the fact that it is not a statement of lawfulness.[313]

The power to define the boundaries of lawfulness extends outward into sociological concepts. McNamara and Quilter have made similar observations in the context of move-on powers, noting that these practices overlay a 'lawful/unlawful dichotomy' with a 'safe/unsafe dichotomy'.[314] A claim to lawfulness is also a normative and ethical claim: that which is 'lawful' becomes that which is 'safe' or 'peaceful'. As such, through their control over the authorisation of protests, police become the 'primary definers' of legitimate protest.[315] This definition is shaped through both legal and ethical claims, constituting a mode of control which strikes at key harms of prior restraint – that decision-making is vested in the

308 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 March 2022, 8938 (Mark Speakman, Attorney-General).
309 Ibid.
310 *NSW Summary Offences Act* (n 204) s 24.
311 Ibid s 25; *NSW Crimes Act* (n 248) s 545C.
312 Gordon (n 205) 446–7.
313 Ibid 447.
314 McNamara and Quilter (n 213) 30.
315 Boon-Kuo et al (n 305) 82.

executive rather than the judiciary,[316] and that narrowness becomes entrenched in policing practices over time. It also reframes the terms of human rights discourse. The United Nations Human Rights Council considers that, if the conduct of an assembly is peaceful, 'the fact that certain domestic legal requirements … have not been met … does not, on its own, place the participants outside the scope of the protection of article 21'.[317] Redefinition of peacefulness can found a claim to exclude protest participants from protection.

VI CONCLUSION

The doctrine of prior restraint in the US is fraught with jurisprudential controversy. But the underlying rationales which motivate that doctrine evidence particular truths about the nature of restraints on expression. The harms inhering in prior restraints – including, for example, adjudication in the abstract, overuse, delay and filtering[318] – are harms which form part of the structure of the administration of laws. Accounting for these considerations is part of the construction of a more principled consideration of the implied freedom of political communication in Australia, and the place of freedom of expression more broadly. Such considerations would reconcile the implied freedom with the elevation of the concept of prior restraint in defamation, allowing Australian law to identify rationales which transcend contexts of historical contingency. At the very least, Australian courts which choose to engage with the concept of prior restraint should do so with particularity, rather than wholly accepting or rejecting the doctrine on the basis that it is a product of foreign law. Doctrine is not always importable, but principles can be shared.

As Part V of this article has sought to show, the need for more fine-grained analysis of restraints on expression is particularly necessary given recent restraints on expression in Australia. Prior restraints on protest illustrate how restrictiveness inheres in systems that produce overbreadth and predispose the executive to narrowness. It is insufficient to trust that balancing exercises will be conducted in an appropriate way where the very structures of those balancing exercises are designed in restrictive terms. The concept of prior restraint enables categorical recognition of why such designs are harmful, and when they should be called into question.

316 Emerson, 'The Doctrine of Prior Restraint' (n 8) 657–8.

317 Human Rights Committee, *General Comment No 37 (2020) on the Right of Peaceful Assembly (Article 21)*, 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 3 [16], citing *Frumkin v Russia* (European Court of Human Rights, Chamber, Application No 74568/12, 5 January 2016) [97].

318 Blasi, 'Toward a Theory of Prior Restraint' (n 11) 49–69.