Proportionality in Australian Constitutional Law

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PROPORTIONALITY IN AUSTRALIAN
CONSTITUTIONAL LAW

Shipra Chordia

A thesis in fulfilment of the requirements for the degree of

Doctor of Philosophy

Faculty of Law

6 February 2018
**DISSERTATION SHEET**

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Proportionality has been used as an analytical method in the constitutional jurisprudence of courts around the world, including in Australia. The method has not, however, been free from controversy. Since its first introduction into Australian constitutional law, there have been debates regarding the appropriateness of proportionality testing in this context.

To date, these debates have been lacking in one important respect: they have not been sufficiently grounded in theory. In times when the global literature on the subject was relatively nascent and applications in comparative constitutional contexts sparse, the under-theorisation of Australian proportionality was understandable. This is no longer the case. The burgeoning international literature and jurisprudence in this field has in recent years generated a rich body of judicial and academic thought from which to elicit a properly theorised consideration of proportionality.

Drawing on these resources, this thesis proposes a theoretical framework for proportionality. It uses this framework to explore a key question in the Australian context: when is proportionality an appropriate analytical tool in constitutional jurisprudence? In examining this question, the thesis considers the primary concerns regarding the appropriateness of proportionality in Australian constitutional law and how these might be addressed. It also makes principled suggestions for the development of Australian doctrine.

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To Dhaisa, who never had the chance

Shipra Chordia
Sydney
6 February 2018
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ABSTRACT

Proportionality has been used as an analytical method in the constitutional jurisprudence of courts around the world, including in Australia. The method has not, however, been free from controversy. Since its first introduction into Australian constitutional law, there have been debates regarding the appropriateness of proportionality testing in this context.

To date, these debates have been lacking in one important respect: they have not been sufficiently grounded in theory. In times when the global literature on the subject was relatively nascent and applications in comparative constitutional contexts sparse, the under-theorisation of Australian proportionality was understandable. This is no longer the case. The burgeoning international literature and jurisprudence in this field has in recent years generated a rich body of judicial and academic thought from which to elicit a properly theorised consideration of proportionality.

Drawing on these resources, this thesis proposes a theoretical framework for proportionality. It uses this framework to explore a key question in the Australian context: when is proportionality an appropriate analytical tool in constitutional jurisprudence? In examining this question, the thesis considers the primary concerns regarding the appropriateness of proportionality in Australian constitutional law and how these might be addressed. It also makes principled suggestions for the development of Australian doctrine.
PART I
INTRODUCTION

At the heart of this thesis is the question of when proportionality can be used as an appropriate method of judicial reasoning in Australian constitutional law. To address this question, this thesis builds a theoretical framework constructed on an examination of the history and conceptual underpinnings of proportionality analysis. This framework attempts to explain why proportionality has emerged in certain forms in modern constitutional jurisprudence, what kinds of problems it might be used to address, and how it might be modified to enhance its suitability to particular constitutional contexts. It is used as a lens to consider the significant disagreement, confusion and criticism which has arisen in response to the application of proportionality in Australian constitutional law, and to make suggestions for future doctrinal development.

I. PROPORTIONALITY IN GLOBAL CONSTITUTIONAL LAW

Australian constitutional law’s engagement with proportionality is part of a wider global phenomenon. In the latter half of the 20th century, proportionality emerged in numerous jurisdictions around the world as a method of judicial reasoning in...
constitutional judicial review. Indeed, it has been suggested by some commentators that ‘almost all constitutional courts are adopting the doctrine of proportionality as their main pillar of constitutional adjudication’. The acceptance of proportionality into the constitutional jurisprudence of common law jurisdictions such as the United Kingdom, Canada, New Zealand and South Africa, in particular, has given rise to claims that a new ‘global model’ of constitutional adjudication has emerged.

In line with this development, there has been a surge in recent global literature on the subject of proportionality. This literature is replete with claims that ‘[t]o speak of human rights is to speak of proportionality’ and that the doctrine is arguably now ‘the post-war paradigm of human rights protection’. As alluring as these claims might at first seem, however, sweeping assertions of this nature have a tendency to disguise considerable undercurrents of dissent and disagreement. In their eagerness to generalise, it might be said that proponents of proportionality have been inclined to downplay certain fundamental difficulties in this area of legal discourse.

A. What is proportionality?

To begin, a significant hurdle is encountered when an attempt is made to define what proportionality analysis actually means in the context of constitutional adjudication. On one hand, there appears to be some broad agreement that it is a

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4 Barak, above n 2, 184-198.

5 Huscroft et al, above n 2, 1. See also, Sweet and Mathews, above n 2, 74.

6 Ibid.

7 Barak, above n 2, 181.


9 See, for example, the claim that ‘differences in formulation and practice need not detract from the claim that proportionality is the jus cogens of human rights law’: Huscroft et al, above n 2, 3.
kind of analysis or ‘doctrinal tool’\textsuperscript{10} that can be used to carry out judicial review.\textsuperscript{11}

There also appears to be an emerging, but by no means settled, view that one prominent form of proportionality analysis, commonly referred to as structured proportionality, broadly proceeds by asking three consecutive questions along the following lines:

(i) Is there a rational connection between the law under judicial review and the purpose that it seeks to achieve? This stage is commonly referred to as suitability testing. At times, it is preceded by a threshold question: is the law aimed at the achievement of a proper purpose or legitimate end? This is commonly referred to as the proper purpose or legitimate ends test.

(ii) Are the means used to achieve the law’s purpose or end necessary in the sense that there is no available alternative that is capable of achieving the same purpose with less restrictive effect on a competing right or interest? This stage is commonly referred to as necessity testing.

(iii) Does the importance of the law’s purpose justify its intrusion into a competing right or interest? This is commonly referred to as the strict proportionality or strict balancing stage.\textsuperscript{12}

A negative answer to any one of the above questions terminates the analysis and is said to lead to the conclusion that the law under review is constitutionally invalid.

A positive answer means that the analysis proceeds on to the next stage, or in the case of the final ‘strict proportionality’ question, leads to the conclusion that the law under review is constitutionally valid.\textsuperscript{13}

On the other hand, it is not at all clear that proportionality necessarily takes this form.\textsuperscript{14} In the early jurisprudence of the European Court of Human Rights,

\textsuperscript{10} Kai Moller, ‘Proportionality and Rights Inflation’ in Huscroft et al (eds), above n 2, 155.

\textsuperscript{11} Sweet and Mathews, above n 2, 73-4; Martin Luteran, ‘The Lost Meaning of Proportionality’ in Huscroft et al (eds), above n 1, 21.

\textsuperscript{12} \textit{R v Oakes} [1986] 1 SCR 103, 136-7 (Chief Justice Dickson, Canadian Supreme Court); \textit{Bank Mellat v Her Majesty’s Treasury (No 2)} [2014] AC 700, 790-1 [74] (Lord Reed, Supreme Court of the United Kingdom); Barak, above n 2, 3, 131; Sir Anthony Mason, ‘The use of proportionality in Australian constitutional law’ (2016) 27 Public Law Review 109, 111.

\textsuperscript{13} Dieter Grimm emphasises that these tests must proceed in this particular order: ‘The next step can only be taken if the law that is challenged has failed on the previous step’: Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 University of Toronto Law Journal 383, 397.

proportionality was not applied with this kind of structure at all but was seen as a
test of a ‘reasonable relationship’ between ‘the means employed and the aim sought
to be realised’. Furthermore, in some jurisdictions, like Australia, seemingly
distinct concepts such as the ‘reasonably appropriate and adapted’ test have been
described as proportionality. Similarly, in the United States, scholars have likened
proportionality to elements of the method of review known as strict judicial
scrutiny. Moreover, even where there is agreement that proportionality takes
the structured form set out above, it does not seem to be applied in exactly the same
way across jurisdictions and contexts. In Canada, for example, an emphasis is
placed on the ‘necessity’ stage of analysis. By contrast, in Germany, all stages are
considered, including the final ‘strict balancing’ stage.

Fundamental questions arise. What is the significance of these different meanings
ascribed to the same label of ‘proportionality’? What is their relationship with each
other? Is this just semantics, or are there real conceptual differences that need to be
understood before a claim can justifiably be made that a ‘global model’ of
constitutional adjudication has emerged? The ever-present danger with uncritical
applications of borrowed labels is, of course, that they have the potential to mask
significant underlying conceptual differences. Thus, to meaningfully engage in

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15 Case “relating to certain aspects of the laws on the use of languages in education in Belgium” (merits) (1968) 6 Eur Court HR (ser A), Part 1B [10].
a majority of the High Court in each case.
162; Donald Kommers and Russell Miller, Constitutional Jurisprudence of the Federal Republic
of Germany (Duke University Press, 3rd revised ed, 2012) 67. In District of Columbia v Heller, Justice Breyer went further and likened the entirety of the strict scrutiny test to proportionality:
18 Grimm, above n 13, 389-390.
19 Ibid 393-5.
global exchange in this area, it is critical to understand precisely what is meant by ‘proportionality’ in constitutional judicial review.

B. What does proportionality assist courts to do?

A second, closely connected, difficulty in this area is an underdeveloped understanding of what it is that proportionality assists courts to do within a constitutional context. To the limited extent that the global literature attempts to provide an answer, it is dotted with ritualistic invocations of well-worn expressions accompanied with little explanation. A common throwaway line, for example, is that proportionality is a form of balancing. But what does it mean to ‘balance’? What exactly is being balanced? When is it required and to achieve what end?

A plausible explanation for this under-theorisation lies in the widely held presumption that proportionality is a helpful tool in the context of constitutional ‘rights’ adjudication. Thus, it is broadly assumed that where a right is infringed in some way, proportionality can assist courts in deciding whether such an infringement is constitutionally permissible. The practice of many constitutional and apex courts around the world supports this conclusion. However, while it is possible to accept the major premise that proportionality may be useful in such a

21 A notable exception is the work of Robert Alexy, which goes into considerable detail to explain the conceptual underpinnings and function of proportionality analysis in the context of German constitutional law: see, Alexy, above n 14. However, as explored in detail in Chapter 3 of this thesis, while Alexy’s theory can tell as that proportionality is helpful when there is a conflict between two ‘principles’, the theory is highly abstract and on its own does not provide sufficient foundation for identification of the precise circumstances in which proportionality is an appropriate analytical tool. This thesis seeks to supplement Alexy’s theory in this regard.


23 See, for example, Jacco Bomhoff’s observation that ‘the language of balancing might well mean very different things at different times and in different places’: ‘Genealogies of Balancing as Discourse’ (2010) 4 Law and Ethics of Human Rights 107, 103.

24 See generally, Sweet and Mathews, above n 2, 73-4; Barak, above n 2; Huscroft et al, above n 2, 1; Gregoire Webber, ‘On the Loss of Rights’ in Huscroft et al (eds), above n 2, 123; Kai Moller, ‘Proportionality and Rights Inflation’ in Huscroft et al (eds), above n 2, 155; Cohen-Eliya and Porat, above n 29; Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification; The Point of Rights-Based Proportionality Review’ (2010) 4 Law and Ethics of Human Rights 141. These can be contrasted with the less prevalent view that proportionality can be used in non-rights contexts: see generally, Alexy, above n 14; Beatty, above n 17; Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and Proportionality’ (1997) 21 Melbourne University Law Review 1.

25 See, for example, Aharon Barak’s survey of jurisdictions that employ proportionality in this way: Barak, above n 2, 181-194, 197-201.
context, two syllogistic, and potentially doubtful, conclusions are commonly drawn: that proportionality is *always* helpful in a ‘rights’ adjudication context, and that proportionality is *only* helpful in this context.\(^{26}\) The global literature does not interrogate whether these secondary assumptions are correct, and thus many questions remain unanswered. What happens when proportionality is applied in a non-rights context?\(^{27}\) Are its conceptual underpinnings so deeply grounded in rights jurisprudence that it would be an inappropriate transplant elsewhere? And without any agreement as to exactly what proportionality assists courts to do, is it possible to say that a global standard has emerged?

**C. How does proportionality relate to institutional considerations?**

A third area of difficulty derives from proportionality’s apparent migration from one constitutional context into others.\(^{28}\) It might be said that there are certain advantages to the transnational migration of a constitutional idea, including the facilitation of ‘dialogue and exchange of information between constitutional systems’.\(^{29}\) On the other hand, a fundamental problem with constitutional borrowings of this kind is that they often contain embedded within them unstated institutional assumptions.\(^{30}\) The problem is amplified in the field of constitutional

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\(^{26}\) See, for example, Aharon Barak’s assumption that proportionality analysis is largely inapplicable in the Australian constitutional context because Australia does not have a bill of rights: Barak, above n 2, 195-6. The one exception for Barak is the application of proportionality in the context of the implied freedom of political communication. Barak’s assumption that proportionality is only applicable in the context of rights adjudication is so strong that it leads him to the (incorrect) conclusion that the implied freedom of political communication is a ‘right’.

\(^{27}\) To some extent, this debate has been taken up in relation to the application of proportionality in administrative law. For example, Michael Taggart has argued that proportionality should be used for rights-based administrative judicial review, whereas the traditional notion of *Wednesbury unreasonableness* should be reserved for use in non-rights adjudication (the ‘bifurcation argument’): ‘Proportionality, Deference, Wednesbury’ [2008] *New Zealand Law Review* 423; cf Paul Craig, ‘Proportionality, Rationality and Review’ [2010] *New Zealand Law Review* 265. An analogous debate has not yet taken place with respect to proportionality in the context of constitutional judicial review.


law which, it has been suggested, is ‘particularly path dependent on initial institutional choices’. It is amplified again in relation to proportionality since the latter is a method of conducting constitutional judicial review and thus a site of interaction between two powerful institutions of government: the judiciary and the legislature. Having regard to all of these considerations, it is therefore entirely possible that embedded within proportionality are significant, but perhaps not immediately apparent, institutional assumptions.

To date, there has been little work carried out in the global literature to de-contextualise proportionality such that its conceptual underpinnings as an analytical tool can be understood separately from the institutional assumptions, if any, ingrained within it. The limited attention that has been paid to de-contextualisation means that any attempt to re-contextualise proportionality to a new jurisdiction or context has the potential to be a flawed exercise. Moreover, when proportionality is discussed in the global literature it is apparent that scholars are often speaking at cross-purposes. Some are referring to the use of proportionality as an analytical tool, deployed in a manner analogous to the application of an algebraic formula to solve a precise mathematical problem. Others are referring to a more substantive notion of proportionality and are deeply concerned by the way that it operates to undermine or reinforce institutional assumptions within the context in which it is applied. What these different perspectives do not seem to address, however, is whether they might complement each other to produce a robust, multidimensional account of proportionality.

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32 Barak, above n 2, 131
33 See, for example, Robert Alexy’s heavy reliance on mathematical formulas and ratios in connection with proportionality: Alexy, above n 14, 52-56, 84-85, 96-100, 120-138, 398-414 and his insistence that aspects of the analysis can ‘only be illustrated numerically’: at 99.
34 See, for example, TRS Allan, ‘Democracy, Legality, and Proportionality’ in Huscroft et al (eds), above n 2, 205.
II. PROPORTIONALITY IN AUSTRALIAN CONSTITUTIONAL LAW

In line with the migration of proportionality to constitutional jurisdictions around the world, it appeared that the concept would also become a prominent feature of Australian constitutional law. In 1994, for example, HP Lee predicted that proportionality would ‘in the course of time play a significant role in determining the validity of Commonwealth legislation’.\(^\text{35}\) However, while proportionality analysis has certainly arrived in Australia, even recently taking the structured form familiar elsewhere,\(^\text{36}\) it has not become the touchstone of constitutional jurisprudence it was once predicted to become.\(^\text{37}\) Instead, the development of proportionality in Australia has been described as ‘theoretically vague’\(^\text{38}\). It has been limited to certain contexts and, even in those, it has been plagued by confusion and criticism.

A. What does proportionality mean in Australian constitutional law?

The first category of concern relates to the considerable uncertainty surrounding the content of proportionality analysis and the contexts in which it is suitable to be applied. It has been observed that the ‘use of the concept of proportionality has not been uniform’\(^\text{39}\) and that the way in which parties have relied on it in recent cases ‘raises questions about its meaning, its use and how it might apply’.\(^\text{40}\) Former Commonwealth Solicitor-General, Justin Gleeson, appeared to be resigned to the view that the ‘most accurate description’ that could be offered is that proportionality is ‘a factor – of varying dimensions – in certain cases’.\(^\text{41}\)


\(^{37}\) See, for example, *Northern Territory v Emmerson* (2014) 253 CLR 393, 439 [85] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).


\(^{41}\) Ibid.
Others have suggested lengthy catalogues of its applications. Chief Justice French, for example, described proportionality as ‘a class of criteria’ which has been ‘applied to purposive and incidental law-making powers derived from the Constitution’ and ‘in determining the validity of laws affecting constitutional guarantees, immunities and freedoms, including the implied freedom of political communication.’ While taxonomies of this kind may be helpful as descriptive accounts of the specific contexts with which proportionality analysis has been associated in Australian constitutional law, they also leave many other questions unanswered. Why is proportionality seen as a ‘class of criteria’ rather than a single doctrine? What is the connection between the various contexts in which it has been said to play a role? Finally, what necessitates different forms of analysis in different contexts?

B. Is proportionality appropriate in the Australian constitutional context?

In addition to the confusion over what proportionality means in Australian law, considerable reservations regarding its appropriateness in the Australian constitutional context have been expressed. It has been said that proportionality inappropriately draws courts ‘into areas of policy and of value judgments’. In making such value judgments, it has been suggested, courts will need to decide cases on ‘matters of justice, fairness, morality and propriety – which are matters for the legislature and not for the court.’ Judges are, in this way, encouraged to exceed their constitutional function in conducting judicial review.

A similar concern is sometimes expressed on a slightly different basis. It is grounded in the view that the judicial function in a constitutional system that does not have a bill of rights is necessarily narrower than its counterpart in jurisdictions with constitutionally-entrenched individual rights. Accordingly, Australia’s lack

44 Cunliffe v Commonwealth (1994) 182 CLR 272, 357.
of a bill of rights has been put forward as a reason to conclude that proportionality is an inappropriate judicial technique in Australia’s domestic constitutional law.\textsuperscript{46}

Finally, concerns have been raised that proportionality in its structured form is too rigid and constrictive of the judicial reasoning process. It has been said that it offers a ‘one size fits all’ approach under which standardised criteria are required to be applied ‘irrespective of the subject-matter of the law and no matter how large or small, focussed or incidental’ the restriction might be’.\textsuperscript{47} The misgiving is that through the application of proportionality constitutional analysis will be ‘reduced to the application of some pre-determined all-encompassing algorithm’.\textsuperscript{48}

III. OBJECTIVES OF THE THESIS

It will be apparent from the above outline that the issues arising in Australia with respect to proportionality bear a close relationship with the gaps in the international literature and jurisprudence in this area. Indeed, it might be said that they are largely local instantiations of a set of globally relevant but unanswered questions. Until these issues are resolved, it is unlikely that proportionality’s trajectory in Australian constitutional jurisprudence will be free from controversy.

In light of this position, this thesis aims to address a key question regarding the application of proportionality in Australian constitutional law: when is it an appropriate analytical tool? Although the question is specifically framed, addressing it comprehensively requires engagement with all of the issues canvassed in the sections above. In this way, it is hoped that the thesis brings greater clarity to the development of jurisprudence relating to proportionality while at the same time aspiring towards a more sophisticated, multi-faceted understanding of this method of judicial reasoning.

\textsuperscript{46} Brown v Tasmania [2017] HCA 43, [160] (Gageler J), [433] (Gordon J)
\textsuperscript{47} McCloy v New South Wales (2015) 257 CLR 178, 235 [142] (Gageler J).
\textsuperscript{48} Brown v Tasmania [2017] HCA 43, [161] (Gageler J).
IV. METHODOLOGY AND LIMITS OF THE THESIS

A. Summary of method

The selection of method for this thesis has been guided by three key aspects of this study. The first derives from the nature of the unanswered questions in this area, as discussed in Section I and II above. Their inherently fundamental character suggests that a method which engages with reasoning from first principles is likely to be of some value in addressing them. The second relevant aspect derives from proportionality’s history and the widely held view that, as a judicial method in public law, it migrated from one jurisdiction, Germany, to many others. This characteristic suggests that a return to proportionality’s origin may yield important, and perhaps overlooked, insights. Finally, a third significant aspect of this study is the nature of proportionality itself as a doctrinal method. The development of doctrine, whether substantive or methodological, is ‘typically deeply rooted within a specific economic, political, moral and cultural background, which can often only be explained from a historical perspective’. The implication for this study is that any investigation into the origin and development of proportionality needs to be contextually sensitive to these influences.

In light of the above considerations, the thesis has two focal points. In relation to the first, there has been a concern to develop a theoretical framework within which to understand proportionality’s rationale with an eye to its historical and contextual underpinnings. Given the limitations of time and resources on this study, building that framework has necessitated concentrating on certain jurisdictions of interest, the selection of which is explained below. The second focus of the thesis has been to apply the theoretical framework to selected areas of Australian jurisprudence to develop a better understanding of proportionality’s application in those contexts, and to ultimately address the research question at the heart of this thesis. The justification for the selection of the particular areas of domestic focus is also explained below.

B. Selection of jurisdictions of interest

Gunter Frankenberg has described a four-stage model by which constitutional migrations should ideally take place.\(^50\) First, Frankenberg suggests, a *point of origin* from which a constitutional concept has emerged must be identified.\(^51\) Second, the constitutional concept must undergo a process of *de-contextualisation* from its local context such that it is transformed into a ‘universally applicable, context-neutral concept’.\(^52\) Third, at the end of the de-contextualisation process, the concept must pass into the metaphorical *global reservoir* of constitutional borrowings from which constitutional actors can ‘shop’ for ‘ideas and institutions, norms and doctrines, arguments and ideologies fabricated and tested in other national or regional contexts’.\(^53\) Finally, to complete its importation into a new context, the concept must undergo a process of *re-contextualisation* so that it can survive in its new host environment.\(^54\) The re-contextualisation phase is inherently risky and can lead to the rejection or mutation of the original concept. It may also necessitate a return to the point of origin to look for “‘missing links’ – institutional parts, doctrinal screws, ideological hooks, and the like’ which make sense of the original concept.\(^55\)

German public law is widely accepted as the site of emergence, or ‘point of origin’, of proportionality as it is now known to global constitutionalism.\(^56\) It is arguable that many of the issues relating to proportionality identified in the previous sections arise because the ‘de-contextualisation’ and ‘re-contextualisation’ process from Germany to other jurisdictions has not taken place with sufficient depth and nuance. Thus, the passage of proportionality from its ‘point of origin’ to the ‘global reservoir’ and then ultimately to its ‘new host environment’ has lacked contextual sensitivity, and missing conceptual links have now become apparent in the form of fundamental unanswered questions. A return to proportionality’s ‘point of origin’

\(^{50}\) Frankenberg, above n 28.
\(^{51}\) Ibid 570-1.
\(^{52}\) Ibid 572.
\(^{53}\) Ibid.
\(^{54}\) Ibid 574-6.
\(^{55}\) Ibid 575.
\(^{56}\) Sweet and Mathews, above n 2, 74, 97; Barak, above n 2, 178-201; Cohen-Eliya and Porat, above n 3, 465.
and an understanding of its organic conceptualisation and development in that context would enable a search for these ‘missing links’.

With this in mind, efforts have been made in this study to pay close attention to proportionality’s development in German public law, in light of that jurisdiction’s particular legal institutions and arrangements and the constraints posed by its political and doctrinal history and legal culture.\(^{57}\) The recent publication in English of a number of works examining the complexities of German constitutionalism from various angles has made this task far more accessible to an outsider than it was even just a few years ago.\(^{58}\) These thick historical accounts and constitutional ethnographies offer a new and rich set of resources for developing a deeper understanding of the contextual origins of proportionality. To the extent that they triangulate each other, they also provide a relatively robust foundation for developing a theoretical framework which can offer explanatory insights to the non-German legal world.

Of course, the claim that German public law is proportionality’s ‘point of origin’ is a relative one and must be made cautiously.\(^{59}\) The method has a conceptual history which pre-dates its emergence in public law altogether, as acknowledged and explored in Chapter 2. On the other hand, as also explained in that chapter, a focus on German constitutionalism avoids further layers of complexity which might have been introduced into the analysis had other jurisdictions, which have themselves taken and modified proportionality analysis from the ‘global reservoir’, been selected as focal points. Attending to the development of proportionality in German public law thus permits the ‘de-contextualisation’ of proportionality, and thus eventual ‘re-contextualisation’ to a new jurisdiction such as Australia, to be

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\(^{59}\) Frankenberg, above n 28, 570-1.
undertaken with relatively greater analytical purity than would otherwise have been the case.

The examination of the history and conceptual underpinnings of proportionality in German public law has been supplemented in this study by two further areas of investigation. The first, considered in Chapter 4, adds an additional layer to the theoretical framework to aid in the ‘re-contextualisation’ of proportionality once it has been transplanted. It explores whether, and if so, how, the appropriateness of proportionality’s application in jurisdictions beyond German public law can be facilitated by contemporary institutional theories, and, in particular, theories relating to judicial restraint. In light of its theoretical nature, the discussion is not grounded in the jurisprudence of any single jurisdiction. It is instead focused on assessing the various theoretical approaches suggested in the literature for their suitability to aiding the re-contextualisation of proportionality analysis to new settings.

The second area of investigation, undertaken in Chapter 5, tests the performance of proportionality against available alternatives. The aim here is to assess whether, even if it is possible to say that proportionality is a suitable method in response to certain types of legal problems, it is nonetheless a ‘false necessity’. That is, although proportionality might be considered appropriate in some circumstances, perhaps there are other more desirable options available. With this in mind, the study turns to a jurisdiction, the United States, which has been recognised as being relatively insulated from international developments and as displaying a high degree of scepticism towards proportionality. Having developed its own jurisprudential trajectory, American constitutional jurisprudence thus offers unique opportunities for exploring alternative methods to proportionality.

C. Areas of domestic focus

After developing and testing the theoretical framework, the thesis then turns to apply that framework to ‘re-contextualise’ proportionality’s application in Australian constitutional law and address the specific research questions that are

the focus of this thesis. In this respect, three areas of Australian jurisprudence have been selected for close examination: characterisation of laws, the s 92 guarantee of free trade and commerce, and the implied freedom of political communication. While these areas are not exhaustive, they have nevertheless been carefully selected for the following reasons.

First, they are the three areas of constitutional law in respect of which it has been repeatedly asserted that the concept of proportionality has some role to play. For example, in 2008, Leslie Zines reflected that ‘proportionality has been used in a number of areas of law in addition to the external affairs power, including s 92 and other cases where it is necessary to balance a freedom or restriction on power with other pressing social interests’.  

Similarly, in McCloy v New South Wales, French CJ, Kiefel, Bell and Keane JJ observed that ‘[proportionality] criteria have been applied to purposive powers;…to incidental powers…; and to powers exercised for a purpose authorised by the Constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom’. On the other hand, the precise role of proportionality across these diverse contexts has never been explained with any theoretical depth.

Second, much of the criticism regarding the ‘appropriateness’ of proportionality analysis in Australian constitutional law has been expressed in these three areas. Thus, for example, in the context of characterisation, McHugh J opined in Lease v Commonwealth that if proportionality became a ‘general touchstone’ of constitutional power, then the High Court ‘would be drawn inexorably into areas of policy and of value judgments’. Similarly, Dawson J warned in Cunliffe v Commonwealth of the ‘danger in the inappropriate use of the concept of

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61 Zines, above n 22, 60.
63 Ibid 195 [3]. See also, French CJ’s observation in Attorney-General (SA) v Adelaide City Corporation (2013) 249 CLR 1: ‘Proportionality criteria have been applied to purposive and incidental law-making powers derived from the Constitution and from statutes. They have also been applied in determining the validity of laws affecting constitutional guarantees, immunities and freedoms’: at 37 [55]. The disparate applications of proportionality led French CJ to conclude that it was ‘not a legal doctrine’ but merely ‘a class of criteria’: at 37 [55].
64 The exception to this claim is the study undertaken by Jeremy Kirk in 1997: see, Kirk, above n 24. However, it has now been over 20 years since that analysis was conducted.
66 Ibid 615-6.
reasonable proportionality to test the validity of legislation'.\textsuperscript{68} While considering proportionality in the context of the implied freedom of political communication in \textit{Brown v Tasmania},\textsuperscript{69} Gageler J recently critiqued the method as inappropriate because it reduced constitutional analysis ‘to the application of some pre-determined all-encompassing algorithm’ contrary to Australian constitutional tradition.\textsuperscript{70} Likewise, in \textit{McCloy v New South Wales},\textsuperscript{71} Gordon J warned of the ‘danger of uncritical use of proportionality from other legal contexts’.\textsuperscript{72} The use of proportionality in the context of s 92 has also been the subject of critical reflection in commentary on that provision.\textsuperscript{73}

Finally, as Ran Hirschl explains, the principle of ‘prototypical cases’ suggests that in testing the validity of a theory or argument based on a small number of cases, these cases should contain within them as many as possible of the unique characteristics that might be found in a much larger sample set.\textsuperscript{74} Such an approach enhances the generalisability of the conclusions reached in the study. In that vein, the three areas of domestic jurisprudence selected for this study each respectively engage with distinct but characteristic aspects of the Australian constitutional landscape: express heads of legislative power (in characterisation), an express limit on legislative power (s 92), and an implied limit on legislative power (the implied freedom of political communication). They can, therefore, be thought of as ‘prototypical’ of judicial review of legislative action as it is carried out in Australia, enhancing the potential generalisability of the conclusions reached in this thesis despite the limited nature of this study.

In light of these considerations, it is hoped that while the areas of Australian constitutional law selected for particular attention in this thesis are not exhaustive,

\textsuperscript{68} Ibid 357.
\textsuperscript{69} [2017] HCA 43.
\textsuperscript{70} Ibid [161].
\textsuperscript{71} (2015) 257 CLR 178.
\textsuperscript{72} Ibid 288 [339].
\textsuperscript{73} See, for example, Amelia Simpson, ‘Grounding the High Court’s Modern Section 92 Jurisprudence: The Case for Improper Purpose as the Touchstone’ (2005) 33 \textit{Federal Law Review} 445, 459-462.
\textsuperscript{74} Ran Hirschl, \textit{Comparative Matters: The Renaissance of Comparative Constitutional Law} (Oxford University Press, 2014) 256.
they nonetheless offer sufficient breadth of insight for the conclusions reached in this thesis to be of enduring value to Australian constitutional law more widely.

**D. Scope and limitations**

There are a number of limitations on the scope of this thesis which ought to be acknowledged at the outset. First, as this thesis is a study of a particular method of judicial reasoning, its aim is to *explain* this method in sufficient depth to facilitate its application in a conceptually sound way. It therefore does not engage with substantive normative questions, such as what level of judicial restraint *should be* applied in a given constitutional setting, or what weight *ought* to be placed on competing constitutional or non-constitutional values. While work of this kind is no doubt an essential complement to the study undertaken herein, it is not the focus of this thesis.

Secondly, the primary aim of this thesis is to address the question of when proportionality might be an appropriate analytical tool in Australian constitutional law. As such, it is not concerned with the use of proportionality in other areas of domestic public law, such as administrative or criminal law, or more broadly in the fields of international or transnational law. While the findings made in this thesis may have implications for some or all of these areas, it is beyond the scope of this thesis to investigate precisely what those implications might be.

Thirdly, there are areas of Australian constitutional law not directly considered in this thesis which may give rise to questions regarding the application and appropriateness of proportionality. These include challenges to legislation based on Chapter III separation of judicial power considerations and federal limitations.

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75 Wider applications of this kind were suggested by Crennan, Kiefel and Bell JJ in *Monis v The Queen*, where their Honours observed that ‘proportionality analysis is a rational response to the inquiry as to how the effect upon a freedom which is not absolute may be tested’: (2013) 249 CLR 92, 214 [346]. However, it should be noted that in *Magaming v The Queen*, the majority rejected the appellant’s contention that certain provisions providing for a mandatory minimum penalty contravened Chapter III of the Australian Constitution because they were not proportionate to the end they sought to serve: at (2013) 252 CLR 281, 397 [51] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). It was not clear from the majority’s reasons whether this rejection was due to an inherent incompatibility of proportionality analysis with assessing Chapter III limitations, or whether it was because in *Magaming* the appellant had sought to ‘mix two radically different ideas’: the concept of proportionality in constitutional judicial review with proportionality in sentencing: at 397 [51].
under the *Melbourne Corporation* principle. Feasibility constraints have limited the capacity to investigate all of these areas. To some degree, this limitation is mitigated by the design of this study which, as discussed above, has sought to maximise generalisability through the selection of prototypical areas of focus. Nonetheless, careful further research will be necessary to fully investigate the implications for areas of Australian constitutional law not directly considered by this thesis.

Finally, in demarcating the scope of this thesis, it seems apposite to make explicit that it does not employ an empirical method. Rather, the analysis has been undertaken by doctrinal research and, where necessary, comparative constitutional study. These methods were selected on the basis of their suitability to the research questions, which are doctrinally focused, and producing legal research that has the potential for application in the future development of jurisprudence. Accordingly, sources for analysis have been limited to written materials, such as published books, peer-reviewed journal articles, conference papers, and primary case law.

**V. STRUCTURE OF THE THESIS**

To address the key research question at the centre of this study, the thesis adopts the following structure. Part I establishes the context and theoretical framework in four substantive chapters. Following this brief Introduction, Chapter 2 explores the history and conceptual underpinnings of proportionality from its pre-public law origins through to its emergence in Prussian public law, further development in German constitutional law and eventual spread to jurisdictions around the world. Through this investigation, the chapter unpacks the historical meanings that have been ascribed to the ‘concept’ of proportionality over time, with a particular focus on the differences between balancing and ‘means ends analysis’, and the reasons why these differences emerged.

Chapter 3 focuses on the development of proportionality in post-war German public law. It examines the key characteristics of the kinds of problems that proportionality

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was directed towards during this period and posits on this basis a four-part test for diagnosing when proportionality might be an appropriate analytical tool in resolving constitutional problems (described as ‘balancing problems’). Through an analysis based on Robert Alexy’s theorisation of the function of proportionality within German constitutional law, the chapter explains why the structured form of proportionality analysis, ‘structured proportionality’, is a particularly close conceptual fit with ‘balancing problems’, and is therefore an appropriate analytical tool for addressing them. In doing so, the chapter also addresses the main critique of Alexy’s theory: the incommensurability argument.

In Chapter 4, the thesis turns to examine the relationship between the development of structured proportionality and the constitutional culture in which it emerged. It is particularly concerned to uncover the interaction between the competing influences of the German legal scientific tradition and transformative constitutionalism during the post-war reconstructive period. This analysis suggests that structured proportionality is the product of a compromise between each of these influences on German legal culture, and is therefore neutral in its stance towards the institutional position of the judiciary relative to other arms of government. In light of this position, Chapter 4 goes on to investigate how proportionality might be married with theories of judicial restraint such that its application can be varied to respond to contexts in which greater or lesser restraint is necessitated by institutional considerations.

The thesis next turns in Chapter 5 to examine judicial methods that have developed in a distinctly different jurisdiction, the United States. Using the four-part diagnostic tool developed in Chapter 3, Chapter 5 identifies an area of American constitutional jurisprudence which displays the key characteristics of the balancing problem: challenges to legislative measures on the basis of the protection of speech contained in the First Amendment. It then examines the principal approaches – formalism, ad hoc balancing, and tiered scrutiny based on categorisation – which have been developed as judicial methods of reasoning to resolve First Amendment cases. It assesses the relative capacity of these methods to assist in addressing the balancing problem, and how well they function as flexible methods of adjusting
judicial restraint in response to institutional considerations arising from case to case.

In Part II of the thesis, the theoretical framework developed and tested in Part I is applied to the Australian constitutional context to answer the key research question driving this thesis. In Chapter 6, an examination is undertaken of the use of concepts of ‘proportionality’ in the characterisation of laws with respect to heads of constitutional power in the Australian constitution. The chapter observes that the process of judicial reasoning required in this area is fundamentally distinct from that which arises in the context of a ‘balancing problem’. On this basis, the chapter uses the theoretical framework to explain why the use of what has been described as ‘proportionality’ in this context is actually misleading, and has led to confusion and criticism.

Chapter 7 turns to consider the application of structured proportionality in the context of the express guarantee of free trade contained in s 92 of the Constitution. The chapter examines the jurisprudence before and after the landmark case of Cole v Whitfield77 before turning to consider the modern approaches to the provision as suggested in the literature, including structured proportionality. It evaluates the viability of these approaches either as descriptive accounts of the current jurisprudence or as prescriptive formulas for how that jurisprudence ought to develop. With the assistance of the theoretical framework developed in Part I, it considers whether structured proportionality is an appropriate analytical tool in the context of s 92 jurisprudence.

In Chapter 8, the thesis undertakes an examination of proportionality in the context of the implied freedom of political communication. It analyses the earliest cases in this area and suggests that in delineating some of the key characteristics of the implied freedom, these early cases also gave rise to an area of constitutional law which has all the hallmark features of the ‘balancing problem’. The chapter considers the balancing approaches taken by some in these early cases, and contrasts these with the largely unsuccessful attempts to avoid balancing by other justices. The chapter then examines the three approaches to implied freedom cases.

which have emerged in modern jurisprudence and critically evaluates each of these. It uses the Part I theoretical framework to explain when proportionality is an appropriate analytical tool in this context, and how criticisms can be addressed.

Chapter 9 concludes with a summary of the key findings of this thesis and makes suggestions for future research.
CHAPTER 2.

PROPORTIONALITY AS A CONCEPT

I. INTRODUCTION

As observed in the previous chapter, the concept of ‘proportionality’ does not have a settled meaning. Indeed, concerns are often expressed that there is ‘confusion about the nature of proportionality’\(^1\) and that ‘agreement as to what proportionality means is either elusive or acquired through abstraction and superficiality’.\(^2\) It seems that it might be possible to trace much of the difficulty associated with the application of proportionality to a fundamental uncertainty as to what it actually is and how it might aid the process of constitutional adjudication.

As an initial step on the journey towards addressing these concerns, this chapter has two primary aims. The first is to map the development of proportionality from classical philosophy through to early continental public law and then into modern constitutional jurisprudence around the world. In doing so, the chapter endeavours to capture a sense of the deep history of proportionality as a concept and the important function that it has performed even as it has migrated into diverse contexts. It also seeks to highlight that, although proportionality is ‘capable of being applied in a range of different ways’,\(^3\) some of these ways may be more analytically coherent than others.

The other aim of this chapter is to provide a justification for the methodology adopted in the remainder of this thesis. Proportionality is now used as an aid to

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The chapter begins in Section II by tracing the classical foundations of proportionality and its application within early ideas of distributive equality and the concept of just war. In Section III, it follows the influence of these ideas upon the emergence of proportionality in Prussian administrative law, particularly as a judicial methodology for checking the expansion of police powers within the emboldened administrative state of the late 18th century, and ultimately post-war German constitutional jurisprudence. Section IV reflects upon proportionality’s migration into the jurisprudence of constitutional courts around the world, with a particular focus on Canada and the United Kingdom. The chapter concludes with an explanation of why, if we are to unlock proportionality’s function in constitutional adjudication, it is necessary to examine how it organically emerged as an analytical tool within its ‘point of origin’.

II. PROPORTIONALITY’S CLASSICAL FOUNDATIONS

In the following section, an account is offered of the development of proportionality, from its emergence as a concept within classical philosophy to its later embeddedness as a standard of legal adjudication. Most accounts of the development of proportionality begin with its emergence in Prussian administrative law. One of the purposes of this section, however, is to illustrate that the concept significantly predates its relatively modern Germanic usage. This history is relevant both for understanding the origins of the concept more accurately and for gaining a greater appreciation of the influence that classical thought had upon the Enlightenment scholarship to follow. Readers ought to be cautioned from the outset, however, that presented here is only a narrow and selective retelling of history, and one which is particularly aimed at understanding why proportionality has, over time and in various contexts, appealed to political philosophers and, ultimately, legal theorists and practitioners. For this reason, this account is necessarily limited in its
scope and ought not be viewed as purporting to offer a detailed historical or theoretical analysis of the thought processes of the thinkers referred to herein – the complexities of their ideas extend well beyond the modest limits of this thesis and have been explored with deserving breadth and dedication in numerous other works. Despite its limitations, however, it is hoped that this account is useful to the reader insofar as it provides an introduction to the lineage and function of some of the various analytical devices that are so fluidly, interchangeably and collectively referred to as ‘proportionality’ in legal discourse.

A. Proportionality as a concept beyond law

Before embarking on a historical journey, it is perhaps useful to begin this account with a brief reflection on what proportionality represents as an idea beyond the confines of legal doctrine. In fields beyond law, proportionality might be said to be a relational concept which describes a state of being ‘proportionate to’ or ‘balanced’ between two or more objects. It encompasses both the precision of mathematical relationships and the fuzzy logic of heuristics, and has application in a diverse range of fields ranging from physics and biology to art and architecture. In natural science fields, two variables may be considered as having reached ‘proportionality’ when the relationship between them adheres to some observable mathematical constant, such as Euclid’s golden ratio. In artistic endeavours, on the other hand, proportionality may be achieved through the more subjective and elusive notion of aesthetic pleasure. The commonality between all of these applications is that a determination of whether any two variables are ‘proportionate’ to one another involves assessing whether the relationship between them is ‘pleasing’ or ‘correct’ as against some standard. It therefore yields a concrete answer from binary options:

5 See, for example, Lord Reed JSC’s description of proportionality in Bank Mellat v Her Majesty’s Treasury (No 2) [2014] AC 700, [74] as a ‘heuristic tool’.
6 Euclid’s ‘Golden Ratio’, which has been perceived as an aesthetically pleasing ratio in the fields of art and architecture, and has been observed in botany, biology and physics. See generally: Mario Livio, The Golden Ratio: The Story of PHI, the World’s Most Astonishing Number (Broadway Books, 2002).
7 Indeed, both ratios and beauty can ground artistic notions of proportionality: see, for example, Matthew Cohen, ‘Introduction: Two Kinds of Proportion’ (2014) 2 Architectural Histories 21.
8 Bernhard Schlink has described this as a ‘tertium comparationis’ and observed that ‘the comparison of proportionality analysis requires a reference point. The reference point is not just a tool for comparison; it is the pivotal point of the decision on proportionality’: Bernhard Schlink,
the relationship is either pleasing or not. The rationality of the answer is further capable of being tested by assessing the strength of the justification provided for it.

B. Plato and Aristotle on proportionality

Given these characteristics, it is unsurprising that the concept of proportionality has been a fertile abstraction for classical philosophers fascinated with the notion of applying the exactness of arithmetics and geometry to the chaos of the natural and human worlds. In Western philosophical thought, the story thus begins with Plato, who was generally fixated with the notion of mathematical proportions or ‘harmony’. Plato’s acknowledgement of proportionality’s utility to political theory appears his last dialogue, the Laws. It is here that he developed the dichotomous notions of absolute and proportional equality. The former involves the distribution of wealth, fame and authority amongst members of a polity in equal shares without distinction as to worthiness. By contrast, proportional equality – which Plato considered the only ‘genuine equality’ – contemplates distribution in proportion to merit, defined by reference to virtue. Proportional equality was thus intended as an examination and critique of the prevailing Athenian preoccupation

‘Proportionality (1)’ in Michel Rosenfeld and Andras Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 718, 720.


10 Rebecca Newberger Goldstein, Plato at the Googleplex: Why Philosophy Won’t Go Away (Vintage Books, 2015), 49: ‘[Plato’s] search for mathematical proportions and “harmonies” even lent itself to medical theories, premised on the supposition that health is a matter of the correct mathematical proportions between the “opposing” constituents of the body, which in those early days were thought of in terms of the hot and the cold, the moist and the dry.” See also Poole, above n 4, 380: ‘proportionality flows through all aspects of Plato’s theory’.

11 From here, we can extrapolate that Plato’s writings on proportional equality were likely novel, rather than simply a record of Socratic orations, as might have been the case had they appeared in an earlier work.


13 Ibid.

14 Ibid 229-230, Book VI [757]: ‘The general method I mean is to grant to the great and less to the less great, adjusting what you give to take account of the real nature of each — specifically, to confer high recognition on great virtue, but when you come to the poorly educated in this respect, to treat them as they deserve’. Cf the slightly different translation offered by B Jowett: ‘...it gives to the greater more, and to the inferior less and in proportion to the nature of each; and, above all, greater honour always to the greater virtue, and to the less less; and to either in proportion to their respective measure of virtue and education’: B Jowett, The Dialogues of Plato Vol. V (Oxford University Press, 3rd ed, 1931) 138, Book VI [757].
with elevating the value of glory or fame (kleos) over an examined life of virtue or moral excellence (areté).  

Plato’s dichotomy, unsurprisingly, resonated with his protégé Aristotle, who incorporated it into his concept of distributive justice or the ‘right ratio’. Under this view, justice is achieved when all parties to a distribution of benefit or burden ‘receive their shares according to their respective merits under the criterion in question’. The concept is therefore capable of being used as an articulation of the balance to be drawn between the interests of the collective in maintaining the common weal, and the interests of the individual in obtaining his or her share.

C. Proportionality in early ‘just war’ theory

Platonic and Aristotelian thought was particularly influential on later Roman philosophy, and particularly on the ideas of Cicero. The influence of these ideas manifested in two quite distinct contexts: as justification for an increasingly static social structure within the Roman Empire, and in the developing notion of a ‘just war’. The former application was a perversion of Plato’s original ideal of proportional equality and has since contributed to its decline. Cicero argued that the relevant standard by which correct distributive proportions ought to be assessed was not areté but the notion of dignatas, gleaned by reference to the extent of an individual’s material holdings in property. Proportional equality was in this way utilised to entrench the social status of the oligarchs as divinely sanctioned by natural law, leading many commentators to dismiss the concept as of little relevance to contemporary standards of equality. However, while Plato’s original theory of proportional equality has consequently suffered, Cicero’s other engagement with proportionality has developed into the international law standards

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15 Goldstein, above n 10, 123-162.
16 Aristotle also developed the twin notion of ‘corrective justice’, which encompasses the notion of returning parties to a conflict to their original pre-conflict positions: The Nicomachean Ethics, (H. Rackham trans, Harvard University Press, 1934) Book V, 273-289. See also Ernest Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 University of Toronto Law Journal 349.
17 Weinrib, above 16, 349.
18 For example, Thomas Poole observes that the influence of Plato on Cicero is ‘palpable’: Poole, above n 4, 381. See also, A. A. Long, From Epicurus to Epictetus: Studies in Hellenistic and Roman Philosophy (Oxford University Press, 2006) 285-306.
19 Poole, above n 4, 387.
20 Ibid 386-7.
of *jus ad bellum* (right to war) and *jus in bello* (justice in war). It is from here that it becomes possible to draw a direct lineage to domestic legal understandings of the concept.

For Cicero, there was both a substantive and a procedural element to the classification of a military engagement as ‘just’, or proportionate. Substantively, a just war was one that was aimed at ‘securing redress of grievances and compensation for losses occasioned by the crimes of the offending party to the persons, property (*res*) or rights (*iura*) of the aggrieved party’. 22 The compensatory aspect of this analysis led him to the conclusion that no war could be just, or proportionate, unless the procedural requirements of ‘an official demand for satisfaction’ had been submitted or ‘warning ha[d] been given and a formal declaration made’. 23 Together the substantive and procedural elements of Cicero’s just war theory operated in furtherance of the principle that an act of aggression on the part of enemies of a state did not, in itself, justify reactive acts of violence by that state out of all proportion to the initial act. As Cicero himself observed:

> …there are certain duties that we owe even to those who have wronged us. For there is a limit to retribution and to punishment; or rather, I am inclined to think, it is sufficient that the aggressor should be brought to repent of his wrong-doing, in order that he may not repeat the offence that others may be deterred from doing wrong. 24

In this analysis we can start to see the emergence of notions that might broadly be associated with modern legal conceptions of proportionality. In particular, the concept of ‘just war’ limits the scope of state power by demanding that the measures taken in war do not exceed that which is necessitated. The standard by which the limit is applied is by reference to the closeness or ‘proportionality’ of the relationship between the initial grievance and the means of achieving redress. In this way, the proportionality of the connection is used as the standard by which to assess the justness of a war.

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24 Cicero, above n 23, Book I, xi, 35 [33].
Further developments in the concept of proportionality as applied in the context of declaring a ‘just war’ came amidst the decline of the Roman Empire. It is here that the early Christian philosopher, St Augustine of Hippo, took up and developed Cicero’s notion of just war for the purposes of reconciling Roman and Christian views of state action. St Augustine’s ideas were heavily influenced both by the circumstances of his times, which he perceived as requiring early Christian converts to be defended against pagan Roman attacks, and by his notions of Christian ‘justice’, which for him could never be achieved in perfect earthly form. Consistent with these influences, in writing his riposte to those who blamed mass conversion to Christianity as the reason for Rome’s sacking in 410, St Augustine declared that a just war, although lamentable and a compromise of the perfect ideals of Christian ‘justice’, was necessitated by the grief caused by an opponent’s wrongdoing. A war, therefore, could be justified as a proportionate return to a (relatively) just Christian order.

St Augustine’s broad, thoroughly theological concept of ‘just war’ occupies a curious place in the story of the development of legal notions of proportionality. On the one hand, historians have found it difficult to synthesise St Augustine’s views into a single secular doctrine, since his engagement with the notion of just war was tangentially spread across multiple other subject matters. He never directly addressed it as a standalone theoretical concept, let alone in a manner divorced from Christian underpinnings of morality. On the other hand, St Augustine cannot be ignored in any serious account, primarily because his views – however disparately located within his other musings – are credited as being the most influential upon subsequent Western philosophical thought in the just war tradition. By the Middle Ages, Thomas Aquinas had cited St Augustine as having declared that ‘just war is wont to be described as one that avenges wrongs, when a nation or state has to be

26 St Augustine, City of God (Eva Sanford and William Green trans, Harvard University Press, 1965) Book XIX, Chapter 7.
27 Mark Evans, ‘Moral Theory and the Idea of a Just War’ in Just War Theory: A Reappraisal (Edinburgh University Press, 2005) 1, 3. Note, however, that other scholars have argued that St Augustine could not have been advocating the assessment of ‘just war’ within a political community since, in the Christian tradition, humans were incapable of conducting such an assessment. See Paul Ramsey, ‘The Just War According to St Augustine’ in Jean Bethke Elshtain (ed), Just War Theory (New York University Press, 1992) 8.
28 Mattox, above n 25, 4-5.
29 Ibid 2-3.
punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly'.  

St Augustine has subsequently (and perhaps somewhat controversially, given the history discussed above) been described as the father of just war theory.  

D. Proportionality as a standard of moral assessment

St Augustine’s position as a central figure in the development of proportionality analysis, if not just war theory, might be disputed by reference to the more Platonic turn that Western philosophical thinking took during the Renaissance. In the hands of jurists like Dutch natural rights proponent Hugo Grotius, this period saw a renewed emphasis on pre-Christian thinking and the emergence of greater sophistication in the concept of proportionality. Grotius was instrumental in articulating, for the first time, detailed principles by which the proportionality between the means of war and its ends might be assessed.  

In a chapter entitled ‘Warnings Not to Undertake War Rashly, Even for Just Causes’ of his most celebrated work, The Laws of War and Peace, Grotius cited Aristotle in advocating that not every war was justified by having a just cause. The damage done by war (evil) was also relevant to the assessment. Thus the standard of assessment for whether ‘correct’ proportionality had been achieved was whether ‘good’ would ultimately outweigh ‘evil’ by reference to both the means and the ends of a war. In this regard, there were three relevant rules. The first was to look to the object of the war. If it was directed at both good and evil, it was permitted if the ‘good has somewhat more of good than the evil has of evil’. By this he appears to have meant that the end must be of the ‘highest importance’ to justify doing the evil.

30 Thomas Aquinas, Summa Theologica, Vol. 3 (Fathers of the English Dominican Province trans, Christian Classics, 1981) 1354, II-II, Question 40. Aquinas added that something that begins as just war could be later rendered unlawful by ‘wicked intention’ such as cruelty or lust for power. Implicit in this observation was the idea that the ongoing conduct of war, not just the initial rationale for it, must be proportionate to the original wrongdoing for it to maintain its just status.

31 Mattox, above n 25, 1.

32 Here used as a term to encompass developments made by Aristotle and Cicero to Plato’s views on just war.


34 Grotius, above n 33, 567.


36 Ibid.
second rule stated that if the good and evil ends of the war were equal, war would be justified only if the ‘effectiveness’ (or means) of the war was more good than evil. Finally, if the good did not outweigh the evil on these assessments, war could still be pursued if the goodness of the means outweighed their evilness by more than the evil outweighed the good in the object of the war.\textsuperscript{37}

Although these rules are complex, Grotius’ overriding concern appears to have been a utilitarian one: to establish a sufficient connection – or ‘proportionality’ – between the importance of the end (or object) of a war and the risk involved in the means that were used to achieve that object. This becomes clear in his reference to an analogy by Cicero as a substitute for his own rules:

\ldots Cicero moves toward the same goal by a more direct path when he says that we must avoid offering ourselves to dangers without cause, for nothing could be more foolish than that; consequently in approaching dangers we should imitate the practice of physicians, who cure by light treatments those who are not seriously ill, but are compelled to apply dangerous and doubtful remedies to more serious diseases.\textsuperscript{38}

Implicit in this analogy is that the standard of whether ‘correct’ proportionality or balance has been achieved between means and ends – and therefore whether a war can be justified as a ‘just’ one – is in the assessment of the relative risk involved in each. The danger of not achieving the object of the war must always exceed the danger involved in the means employed to achieve it.

\textbf{III. PROPORTIONALITY IN GERMAN PUBLIC LAW}

\textit{A. Proportionality as means ends analysis}

After developing in the context of just war theory, the concept of proportionality emerged in the work of Prussian Enlightenment scholars of the late 18\textsuperscript{th} century who drew upon the influence of both ancient and medieval natural law thinkers. Indeed, the influence of Cicero and Grotius was openly acknowledged by the leading public law scholars of the time.\textsuperscript{39} Yet they now perceived of a new role for

\textsuperscript{37} Ibid.

\textsuperscript{38} Ibid.

\textsuperscript{39} Knud Haakonssen, ‘German natural law’ in Mark Goldie and Robert Walker (eds), \textit{The Cambridge History of Eighteenth Century Political Thought} (Cambridge University Press, 2006) 251, 251.
proportionality in the natural law tradition: as the basis on which the concept of individual rights as against the police state might be introduced into public law through the courts.\textsuperscript{40}

The concept of proportionality in this new context took two distinct forms. In the first, Prussian legal theorists claimed, against a background of rising police powers and no bill of rights, that natural law provided that the exercise of state power ought to be proportionate to the object it was designed to achieve. It was argued that 'natural rights demand that the use of police powers by the government be proportionate'\textsuperscript{41} and, more importantly, that 'police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much.'\textsuperscript{42}

Embedded in these statements was the idea that a requirement of proportionality between means and ends, with distinct conceptual similarities to Cicero’s analogy in the just war context, should operate as a limit on state power. For the assessment of whether ‘correct’ proportionality had been achieved, the standard was whether the means had been tailored to the end such that they did not exceed what would be necessary to achieve it. The implicit assumption was that assessing proportionality on this basis would reduce any collateral incursion into ‘natural freedoms’ or ‘individual rights’, the specifics of which a jurist or court was not required to articulate.

In this ‘means ends’ form, proportionality formed a critical aspect of the developing notion of Rechtsstaat, which roughly translates to ‘rule of law’. The requirements of Rechtsstaat were a response to what had previously been authoritarian rule in Prussia, where state action – particularly by the monarch – went largely unchallenged even in the absence of legal authority.\textsuperscript{43} The gradual acceptance of a


\textsuperscript{41} Otto Mayer, Deutches Verwaltungsrecht (Duncker und Humblot, 1895) 267, cited in Cohen-Eliya and Porat, above n 40, 273.


\textsuperscript{43} Cohen-Eliya and Porat, above n 40, 271.
shift away from absolute rule and towards *Rechtsstaat* meant that new limitations on state authority were increasingly seen as necessary and legitimate. Under the first principle of *Rechtsstaat*, state authority could only infringe individual freedoms when there was express legal authority to do so. The second principle – proportionality in the form of means ends analysis – went even further. It demanded that state authority could only legitimately infringe on individual freedoms when it was *necessary* to do so.\(^44\)

**B. Proportionality as a form of balancing**

A second form of proportionality emerged out of a series of lectures delivered in 1791-2 by the influential natural law theorist, Carl Gottlieb Svarez.\(^45\) Svarez did not expressly employ the term ‘proportionality’ in his writings and speeches, yet it is clear that the concept with which he was concerned was what is now known by that appellation.\(^46\) Svarez acknowledged the role of the concept in establishing the relationship between the means of achieving state ends and the ends themselves.\(^47\) But for him, limitations on state action also had a second dimension, as he explained in *Vortrage uber Recht und Staat* (Lectures on Law and State):

> Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail… The hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.\(^48\)

This version of proportionality, which will be referred to as the ‘balancing’ form, involved conducting a weighing exercise\(^49\) between the cost (to an individual right)

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\(^44\) Ibid 272.
\(^45\) Barak, above n 9, 177.
\(^46\) Ibid 178.
\(^47\) Like Gunther Heinrich von Berg, Carl Gottlieb Svarez was of the view that the State was only justified in limiting the rights of the individual ‘to the extent necessary for the liberty and security of others’, quoted in David Currie, *The Constitution of the Republic of Germany* (University of Chicago Press, 1994), 307.
\(^49\) A different form of ‘balancing’ also emerged contemporaneously in German private law. It appears, however, that this idea of ‘balancing’ was conceptually disconnected from its public law counterpart and had no influence upon its development: see Cohen-Eliya and Porat, above n 40, 275.
and the benefit (to a collective ‘good’) of a state measure. The ‘balancing’ form of proportionality and means ends analysis both adhere to the essential elements of proportionality analysis common to the earliest forms suggested by Plato and Aristotle. That is, they both assess the ‘correctness’ of the relationship between two variables by reference to some external standard. The purpose of each is represented by the common aphorism for proportionality: ‘you don’t use a sledgehammer to crack a nut’.

Yet the ‘balancing’ form of proportionality was also distinct from means ends analysis in a number of critical respects. The relevant variables for the proportionality ratio were not just means and ends, but rather the broader and more qualitative assessment of the value of the interests of the collective against the value of the interests of the individual. The standard of assessing the proportionality between these variables was that the ‘benefit’ to the collective interest embodied in the state measure outweighed the incursion into the individual right or freedom. Thus, the ‘balancing’ form of proportionality required that the individual freedom infringed by state action be specifically identified, and the normative weight to be assigned to it be articulated with legitimacy.

C. The dominance of means ends analysis in Prussian administrative law

The trajectories of these two forms of proportionality within German public law echo the conceptual differences that underpin them. In the codification of the Prussian civil code (the Allgemeines Landrecht, or Prussian General Law) which took place during the reigns of Friedrich the Great and his successor Friedrich Wilhelm III, Carl Gottleib Svarez was appointed to the key role of principal draftsman. Until this point, proportionality had only been discussed in theory. Now, for the first time, through Svarez’s drafting of Article 10 II 17 of the civil code, a connection to the concept could be found in the law itself. The Article read:

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51 Sweet and Mathews, above n 42, 100.
52 Ibid.
53 Ibid 99-100.
The office of the police is to take the necessary measures for the maintenance of public peace, security, and order…

The Article’s reference to ‘necessary measures’ was a reference to means ends analysis, with ‘public peace, security and order’ set down as the legitimate ends that could be pursued.54 The formulation represented the first explicit textual limitation placed on state action, which until then had been validated even in the absence of authorisation under law.55 From its commencement, the scope of the provision was broad, since in the late 19th century police powers extended to ‘measures designed to promote the public welfare, morality, and public safety, encompassing nearly the whole of the state’s (then fairly primitive) interventions in society’.56 However, although Svarez had theorised a more reaching form of proportionality – the balancing form described above – it was only the means ends form that was eventually incorporated into the Prussian civil code.

During the course of the next century, as Prussia shifted towards Rechtsstaat, means ends analysis took on even greater significance as increasing emphasis was placed on administrative law as the mechanism for limiting the expansionist tendencies of the regulatory state.57 No longer tied to the brief textual recognition given to it in Article 10 of the civil code, means ends analysis began to be treated as a general principle of a growing body of administrative law.58 However, although means ends analysis was employed regularly to strike down police powers,59 the Prussian administrative courts rarely extended their analysis to the more evaluative ‘balancing’ form that had been theorised by Svarez.60

It has been speculated that the reason for this was the prevailing German legal scientific tradition, which at this time was emphasising an approach to law epitomised by ‘an autonomous, complete, and logical system of concepts and rules that contained within it solutions for all the cases that came before it’.61 Under this

54 Currie, above n 47, 308.
55 Cohen-Eliya and Porat, above n 40, 271.
56 Sweet and Mathews, above n 42, 98.
58 Currie, above n 47, 308; Sweet and Mathews, above n 42, 101.
59 Barak, above n 9, 179.
60 Some exceptions to this general position have been acknowledged. See, Sweet and Mathews, above n 42, 101-2 fn 74; Cohen-Eliya and Porat, above n 40, 274 fn 44.
61 Cohen-Eliya and Porat, above n 40, 274.
tradition, the kind of qualitative cost-benefit analysis that would have been required in the balancing form of proportionality would have been beyond what could legitimately have been undertaken by the judiciary and justified as strictly ‘rational’.62 This was particularly so given that there was no textual basis for conducting such an assessment; there was simply a generalised notion of ‘individual freedoms’.63 On the other hand, means ends proportionality was a more legalistic form of analysis, which aligned well with the formalist leanings of the legal scientific tradition. The courts were not making value judgments but merely ensuring that the means adopted by a law were necessary to achieve their ends.

Even in the means ends form, proportionality served a critical function of which liberal legal scientific philosophers approved. It enabled the courts to protect individual freedoms by applying limits on state action despite the absence of an expressly justiciable set of constitutional rights.64 That function continued throughout the 19th and early 20th centuries, surviving several largely unsuccessful attempts to constitutionalise German public law and introduce an entrenched set of individual rights as against the state.65 By the period 1875-1918 leading up to and including the Weimar Republic, administrative judicial review had in this way became ‘a functional substitute for a lack of constitutional review’.66 This trend continued until at least 1933, when the German parliament was disempowered and Rechtsstaat became a rapidly irrelevant limitation on state action.67 State action

63 Cohen-Eliya and Porat, above n 40, 272.
64 Ibid.
65 Including the 1849 Paulskirchenverfassung, which incorporated a Bill of Rights but never came into force; the Prussian Constitution of 1850, which also contained an extensive Bill of Rights but only survived until 1871; the 1871 Bismarcksche Reichsverfassung, which contained no Bill of Rights and no provision for judicial review of statute; and the 1919 Constitution of the Weimar Republic, which contained a Bill of Rights but became obsolete during the Second World War. See further, Currie, above n 47, 1-8. Note that Stone Sweet and Mathews point to an example of ‘interest balancing’ in an unusual instance of a citizen exercising police powers in a 1929 case that came before the Hamburge Oberlandesgericht. However, the case is exceptional rather than exemplary in this regard: Sweet and Mathews, above n 42, 101 fn 74.
66 Michael Stolleis, ‘Judicial Review, Administrative Review and Constitutional Review in the Weimar Republic’ (2003) 16 Ratio Juris 266, 270. It is important to note, however, that during this period constitutional judicial review was not non-existent. As Kommers has noted, under the Weimar Republic, the Staatsgerichtshof ‘was a part-time tribunal whose members convened periodically to decide constitutional disputes’: Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press, 1997) 5.
67 Barak, above n 9, 179; Michaela Hailbronner, Traditions and Transformations: The Rise of German Constitutionalism (Oxford University Press, 2015) 75.
during the Nazi era was routinely shielded from judicial review by its strategic designation as ‘political’. 68

D. The rise of the balancing form of proportionality in German constitutional law

The post-war era in Germany was shaped in many ways by the shock and guilt of the atrocities committed by the Nazis. German legal and political discourse was now overwhelmingly concerned with rebuilding the state in a way that would fortify against any resurgence of totalitarianism and imperialism. Concepts such as the rule of law would need to play a renewed role in redefining German identity, forming the basis for a stable democracy and respect for human dignity.69 An emphasis would also need to be placed on separating institutional powers, including an independent judiciary, and establishing access to the courts ‘for citizens seeking to defend themselves against arbitrary state action’.70 The Basic Law – which would go on to become Germany’s most stable and comprehensive constitution – was conceived as a mechanism to achieve these ends.

By the time the Basic Law was being drafted, influential scholars such as Rudolf Smend and Gerhard Leibholz, who had first developed their ideas during the weakening Weimar Republic, were arguing that rights ought to be understood as a structure of ‘legalized values’ underpinning all constitutional law.71 The influence of these ideas meant that not only were fundamental rights incorporated into and given prominence within the Basic Law,72 but they were drafted broadly and accompanied by an explicit recognition of the values they reflected.73

Although the Basic Law did not expressly provide for proportionality, the German Federal Constitutional Court (the ‘Constitutional Court’) recognised the existence of the principle from its earliest decisions. In this early period, the form of analysis

68 Sweet and Mathews, above n 42, 103.
70 Hailbronner, above n 67, 77.
71 Sweet and Mathews, above n 42, 103.
shifted with no particular or fixed structure. Over time, however, means ends analysis began to be considered a deficient form of proportionality when it was applied on its own. As Rupprecht von Kraus argued at the time, it could lead to results that were unduly weighted in favour of the public interest. He observed, ‘if the measure is only necessity, then a quite negligible public interest could lead to a severe right infringement, without being unlawful’. Since an opposing right or interest could now be identified with relative normative certainty and legitimacy in the Basic Law, the conflict and compromise between the competing interests could now be directly assessed, rather than indirectly through the proxy of means ends analysis. Thus, it was argued, the analysis could be extended to include both of the dimensions originally suggested by Svarez.

The jurisprudence followed the theory. After a period in which it consolidated its legitimacy, the Constitutional Court adopted the more expansive version of proportionality which encompassed both a means ends analysis, in the form of a least restrictive alternative test, and a balancing analysis, in the form of a strict proportionality test. In the 1958 *Apotheken-urteil* (*Pharmacy case*), the Constitutional Court issued a decision that included both means ends analysis and the ‘balancing’ form of proportionality analysis. Over the course of the next decade, in a series of cases, these tests were further refined. They are now commonly expressed in the following form:

In its German version, proportionality reasoning is a three-step process. First, whenever parliament enacts a lawimpinging on a basic right, the means used must be appropriate (*Eignung*) to the achievement of a legitimate end…Second, the means used to achieve a valid purpose must have the least restrictive effect (*Erforderlichkeit*) on a constitutional value…Finally, the means used must be proportionate to the end. The burden on the right must not be excessive relative to the benefits secured by the state’s objective (*Zumutbarkeit*).

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74 Hailbronner, above n 67, 119.
76 Sweet and Mathews, above n 42, 104-5.
77 *Pharmacy case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) 7 BVerfGE 377.
78 Sweet and Mathews, above n 42, 109.
79 Kommers, above n 66, 46.
As Chapter 3 will explore in depth, these stages of analysis have come to form the basis of what is now known as ‘structured proportionality’, or the German form of proportionality.

IV. PROPORTIONALITY IN GLOBAL CONSTITUTIONAL LAW

From the 1970s, proportionality spread at a fairly rapid pace from its Germanic origins to transnational and domestic constitutional jurisprudence of jurisdictions around the world. It is not possible to document all the complexities of this migration within the limited scope of this thesis, and indeed these lineages have been traced in some detail elsewhere. The focus of the following section is, instead, twofold. It is to provide some explanation for the transplant of proportionality from its place of origin to the ‘global reservoir’ of concepts and the complexities inherent to that process. It is also to explain why, in addressing the question of what function proportionality serves in constitutional adjudication, it is necessary to return to its point of origin, rather than rely on comparisons with secondary jurisdictions into which the method has been transplanted.

To achieve these ends, the following section focuses on the use of proportionality in two jurisdictions to which it has recently migrated: Canada and the United Kingdom. Being jurisdictions which share a constitutional heritage with Australia, both are frequently used as sites of comparison literature and jurisprudence. Furthermore, Canada is widely accepted as the first common law jurisdiction to have adopted structured proportionality, and is often credited as the jurisdiction from which the method spread to Australia. It seems obvious, then, that there

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80 Sweet and Mathews, above n 42; Barak, above n 9.
83 Barak, above n 9, 195-6. Although this claim has been made, there are grounds for disputing it. The concept of proportionality was already in Australian jurisprudence by the 1983 case of Tasmania v Commonwealth (1983) 158 CLR 1, 260 (Deane J), three years before Oakes was decided. Although Deane J referred in that case only to Australian case law as the basis for the concept, there has been some suggestion that his Honour was inspired into breathing new life into that jurisprudence by the use of proportionality in the work of the European Court of Human Rights and the European Court of Justice: see, Minister for Resources v Dover Fisheries Pty Ltd (1993) 116 ALR 54, 64 (Gummow J); Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 Melbourne University Law Review 1, 2.
would need to be compelling reasons to exclude them from a study focused on uncovering the role of proportionality in Australian constitutional law. These are provided in the following sections.

A. Canada

The common law world began to take note\(^{84}\) of proportionality when the Canadian Supreme Court famously adopted a form of the method in its decision in \textit{R v Oakes}.\(^{85}\) In that case, Chief Justice Dickson, writing for the Court, observed that in light of Section 1 of the \textit{Canadian Charter of Rights and Freedoms},\(^{86}\) there were three considerations to be taken into account when deciding the validity of legislation that purportedly encroached upon the rights contained within the \textit{Charter}: that the means were rationally connected to their objective, that the means impaired \textit{Charter} rights as minimally as possible and that there was a proportional relationship between the means and the objective they were trying to pursue and the effect on the \textit{Charter} rights.\(^{87}\)

In setting down this version of proportionality, Chief Justice Dickson made no direct reference to German jurisprudence. Nonetheless, the similarities are obvious in his Honour’s references to the functional equivalents of the suitability, necessity and strict proportionality stages of German proportionality. Furthermore, by the time \textit{Oakes} was decided, numerous suggestions had been made in Canadian scholarship that the jurisprudence of the European Court of Human Rights – which itself had borrowed proportionality from Germany – might be helpful in deciding \textit{Charter} cases involving Section 1 limitations.\(^{88}\) Thus, while the Supreme Court of Canada may have had its reasons for not wishing to directly cite German case law,

\(^{84}\) See, for example, Lord Reed’s observation in \textit{Bank Mellat v Her Majesty’s Treasury (No. 2)} [2014] AC 700, [74] that ‘The judgment of Dickson CJ in \textit{Oakes} provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning’.

\(^{85}\) [1986] 1 SCR 103.

\(^{86}\) Article 1 provides: ‘The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

\(^{87}\) [1986] 1 SCR 103, 139.

it seems fairly incontrovertible that the Canadian version was in some way a derivative of its continental cousin.89

Even with its bold introduction into Canadian constitutional jurisprudence, the Oakes test has not been free of controversy. Indeed, in a case handed down less than 10 months after Oakes, R v Edwards Books & Art Ltd.,90 the Supreme Court appeared to water down the strength of the Oakes tests considerably. Thus, while under the Oakes necessity stage, it had asked whether the law was the least intrusive alternative available, in Edwards Books the Supreme Court asked only that the law impair Charter rights ‘as little as is reasonably possible’.91 In response, scholars suggested that the Court was choosing to apply a less searching form of scrutiny to laws towards which it was ‘relatively sympathetic’.92 In subsequent cases, the Supreme Court introduced a number of ‘categorical distinctions’ on the basis of which it would either apply a more or less deferential approach to the necessity test.93 Categorical distinctions were based on various factors, including policy areas, the nature of the competing interests at stake, and the targeting of vulnerable groups. The categories have since been described as an ‘elaborate set’ to which the Supreme Court itself often does not adhere and which have necessitated so many countless exceptions that they have become untenable.94

On the other hand, although there have been some uncertainties regarding the manner in which the necessity test should be applied, the Supreme Court has placed an emphasis on this stage of analysis and has by and large avoided invalidating laws within the strict proportionality stage. In other words, if a law is found to be necessary then – under the Supreme Court’s approach – it is highly unlikely to be subsequently held invalid because its incursion into a Charter freedom is unjustified by the importance of the end it is aiming to achieve.95 Thus, the Supreme Court has

89 Others have speculated similarly. See, for example, Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 University of Toronto Law Journal 383, 384.

90 [1986] 2 SCR 713.

91 [1986] 2 SCR 713, 772.


94 Ibid 515-16.

95 Grimm, above n 89, 389.
in form adopted a test which looks very much like German structured proportionality, but which in substance operates like means ends analysis. And it has done so being aware of the deficiencies of conducting means ends analysis alone. For example, Chief Justice Dickson observed in *Oakes*:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.\(^{96}\)

*B. United Kingdom*

Similar observations might be made of the use of proportionality in the United Kingdom, which is said to have borrowed the concept in turn from Canada.\(^{97}\) The House of Lords initially adopted a much more cautious approach to the method than its Canadian counterpart. This caution can be seen in the truncated form of proportionality in Lord Steyn’s decision in *R (Daly) v Home Secretary*:

> …the court should ask itself: “whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”\(^{98}\)

As the above passage demonstrates, the House of Lords’ three-stage test eschewed balancing in a strict sense, at least initially, adhering to the means ends proxy form. Wade and Forsythe summarised the position in English law as proportionality ordaining that ‘measures must not be more drastic than is necessary for attaining the desired result.’\(^{99}\)

Lord Steyn’s observations were made in light of the UK Human Rights Act’s commencement by the time *Daly* had come before the House for decision.\(^{100}\) However, the facts on which *Daly* was decided arose prior to the Act coming into

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\(^{96}\) *R v Oakes* [1986] 1 SCR 103, [71].

\(^{97}\) *Huang v Home Secretary* [2007] 2 AC 167, 187 [19].

\(^{98}\) *R (Daly) v Home Secretary* [2001] 2 AC 532, 547 [27] quoting the earlier Privy Council decision in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde).


\(^{100}\) *R (Daly) v Home Secretary* [2001] 2 AC 532, 547 [27].
force and so the issues were technically dealt with on common law grounds. There was in this sense a distinct parallel with the approach taken by the Prussian administrative courts to proportionality as a limit on state action. In both circumstances, there was no textual limitation upon which the respective courts could hang a balancing form of analysis, and thus it was convenient to adopt a method that broadly avoided the need to articulate with any precision the existence of a competing individual freedom.

There has, however, been a considerable shift in tone in the United Kingdom since the Human Rights Act has come into force. The Act appears to have had a transformative effect on the House of Lords/Supreme Court’s view of its role as an apex court, with some arguing it has led to the emergence of de facto judicial supremacy in the UK. Whether or not one finds that argument convincing, there seems to be some consensus that the UK courts now fulfil their interpretive function under s 3 of the Act in a manner that has ‘advanced beyond even the broadest conception of their pre-HRA common law, rights protective powers’.

There appears to be a correlation between this transformation in perceptions of the UK Supreme Court’s role and the development of proportionality analysis in that jurisdiction. In 2004, there was some early suggestion the House of Lords might extend its review to consider some aspects of ‘balancing’. That transition was not, however, explicitly acknowledged until Huang v Secretary of State for the Home Department. There, Lord Bingham expressly extended the Daly doctrine to include a strict proportionality stage:

This [Daly/de Freitas] formulation has been widely cited and applied. But counsel for the applicants…suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is the need to

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103 Ibid 191.
104 R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368, [20].
balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked.\textsuperscript{106}

In the more recent case of \textit{Bank Mellat v Her Majesty’s Treasury (No. 2)},\textsuperscript{107} Lord Reed approved of the \textit{Huang} extension of the \textit{Daly} test to include a balancing stage. Lord Reed nonetheless sounded a note of caution regarding its application in the jurisprudence of the United Kingdom. In order to reflect the practical workings of a ‘devolved system such as that of the United Kingdom’, Lord Reed asserted, it would be necessary to afford the legislature a ‘margin of appreciation’.\textsuperscript{108} Lord Reed did not, however, provide guidance as to why a devolved system necessitated a margin of appreciation. Furthermore, except for the suggestion that it would involve something less than a strict application of the necessity test,\textsuperscript{109} it was not apparent from Lord Reed’s reasoning how such a margin of appreciation would be, or had already been, incorporated into the application of proportionality in the United Kingdom.

\textit{C. Returning to the ‘point of origin’}

What is clear from the above discussion is that Canadian and British applications of proportionality have been imbued with layers of contextual meaning that respond, however effectively or ineffectively, to the institutional forces encountered in those jurisdictions. The complexity is compounded in this respect because Canada and the United Kingdom have themselves borrowed the concept from elsewhere, increasing the potential that even before its transplant to those jurisdictions, proportionality had embedded within it contextually-dependent layers reflecting institutional concerns within its jurisdiction of origin. For these reasons, if there is going to be a successful attempt at differentiating between the ‘a-contextual’ meaning of proportionality and its context-dependent application,\textsuperscript{110}

\begin{footnotesize}
\textsuperscript{106} Huang v Home Secretary [2007] 2 AC 167, 187 [19]. This formulation has now been accepted in a series of cases: \textit{R (Quila) v Secretary of State for the Home Department} [2012] 1 AC 621 [45]; \textit{Bank Mellat v Her Majesty’s Treasury} [2014] 1 AC 700, [20] (Lord Sumption); [83] (Lord Reed, in dissent); \textit{Kennedy v Charity Commission} [2014] UKSC 20, [54] (Lord Mance).

\textsuperscript{107} [2014] AC 700.

\textsuperscript{108} Ibid [75].

\textsuperscript{109} Ibid.

\textsuperscript{110} Pierre Legrand, ‘The Impossibility of ‘Legal Transplants’” (1997) 4 Maastricht Journal of European and Comparative Law 111. Legrand argues that this problem means that legal transplants should not occur, but other scholars have suggested that this is an overstatement and merely that the problem is an obstacle which needs to be overcome: see, Sujit Choudhry,
then looking at Canadian and UK jurisprudence is likely to raise more questions than it resolves.

There is, on this basis, a compelling case to be made that returning to proportionality’s ‘point of origin’ in constitutional law – its emergence in German post-war constitutional jurisprudence – is likely to be the most fertile ground for successfully decoupling its operation as an analytical tool from its contextual application. Of course, there are a number of objections that need to be dealt with in order to sustain this claim.

The first objection might be that proportionality does not have a ‘single point of origin’. Indeed, the aim of the earlier sections of this chapter was to shed light on proportionality’s deep history stretching back to classical Western philosophy and the heavy influence of Prussian administrative law on its eventual emergence in German constitutional law. It seems incongruous, then, to suggest that German constitutionalism is proportionality’s ‘point of origin’. The objection is forceful, and the importance of understanding the concept’s lineage should not be downplayed. It is suggested, however, that for the modest purposes of the current analysis it is justifiable to narrow in on the concept’s development within the context of constitutional adjudication. After all, this is the specific application of proportionality with which this thesis is concerned. Thus, while the deeper history of proportionality is not ignored in this thesis, it seems defensible to situate the focus of analysis within the original constitutional context in which it arose, and in this sense German constitutional law serves as the relevant ‘point of origin’.

A second objection might be that the application of proportionality in German constitutional jurisprudence is, itself, likely to be imbued with contextualised responses to institutional concerns in that jurisdiction, making it difficult to separate these from the underlying workings of proportionality as an analytical tool. This is a valid objection, and one this thesis seeks to address rather than avoid. In later chapters, the thesis attempts to understand proportionality not just as an analytical tool but also by exploring the wider institutional forces that have shaped it in

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111 Frankenberg, above n 81, 571-2.
German constitutional law. Whatever might be said about the ultimate success of that attempt, it seems fairly incontrovertible to suggest that undertaking it in the context of a single jurisdiction is a much more straightforward exercise than unravelling multiple layers, as would have been necessary had Canada or the United Kingdom been selected as sites for analysis.

A third objection might be that the approach taken in this thesis has the potential to gloss over important insights that might be gained from looking to the application of proportionality beyond its point of origin. Again, this is a valid objection and there may be important comparisons to be drawn in future research. On the other hand, this study is concerned with fundamental issues regarding proportionality, such as what the method does as an analytical tool. These basal questions need to be confronted before the answers to them can be usefully dressed in further layers of nuance. As such, while future research which looks to other jurisdictions is very much needed, the foundational nature of this particular study necessitates a careful examination of the origins of proportionality in global constitutional law.

V. CONCLUSION

The concept of proportionality has a lineage reaching back to classical Greek and Roman philosophy, where it was developed as a standard of normative assessment in distributive justice. Over time, legal philosophers applied the concept to advance the notion of a ‘just war’, and from there continental natural law theorists borrowed it as a means of limiting police powers within a rapidly expanding administrative state. As a direct descendent of these early conceptual uses, proportionality emerged as a method of judicial reasoning within the constitutional jurisprudence of the German Federal Constitutional Court in the post-war era. It then migrated to numerous jurisdictions around the globe.

As it developed as a tool of judicial reasoning in public law, two forms of proportionality emerged. The first accorded with early theorisation which suggested the method as an appropriate technique for adjudicating cases in which there was a competition between collective goods and individual freedoms. This form of proportionality asked whether the means used by the state to achieve particular ends
were necessary, and whether the ends pursued justified encroaching upon individual freedoms.

In the absence of a textual basis on which to assess the ‘incursion’ into individual freedoms, however, a second more abbreviated form of proportionality emerged within the jurisprudence of the Prussian administrative courts. This form – means ends analysis – tested only the necessity of the means used by the state to achieve its ends. It was, therefore, a more legalistic method of applying limits on state action than the full form of proportionality that had been theorised. On the other hand, in avoiding making a value judgment about the ends sought to be achieved by the state, it was also only a proxy form of adjudicating on a conflict between collective goods and individual freedoms.

Ultimately, against the backdrop of the ratification of a new, more substantive constitution, the full form of proportionality re-emerged in the constitutional jurisprudence of post-war Germany. It was this ‘form’ (structured proportionality) that ultimately migrated to other jurisdictions, such as Canada and from there, the United Kingdom. However, when the jurisprudence of its new hosts is examined, we find that structured proportionality has not been applied in these contexts in the straightforward manner one would expect of a mere analytical tool. Indeed, despite its deficiencies, means ends analysis has continued to play a role in the judicial reasoning of these jurisdictions, and other adjustments have also been made to accommodate local institutional considerations.

In light of the contextual layers that have been added to the application of proportionality in the jurisdictions to which it has been transplanted, it is necessary to return to the concept’s point of origin in order to address the fundamental questions at the heart of this thesis, such as how it operates as an aid to constitutional adjudication. To that end, while the focus of this chapter has been to provide a broad historical overview of the concept of proportionality, the next chapter converges on the constitutional jurisprudence of post-war Germany in an attempt to uncover how proportionality functions as an analytical tool.
CHAPTER 3.

STRUCTURED PROPORTIONALITY AS AN ANALYTICAL TOOL

I. INTRODUCTION

The previous chapter examined the development of proportionality from its origins in classical Western philosophy through its emergence in a structured form in the domestic public law of Germany and, ultimately, to its spread to constitutional jurisdictions around the world. In this chapter, the narrative is developed further by concentrating on the post-war jurisprudence of the German Federal Constitutional Court (the ‘Constitutional Court’) as it has developed in the era of the Basic Law. As discussed in Chapter 2, it is the structured version of proportionality refined during this period that has had the most enduring influence on contemporary global applications of the concept.

Structured proportionality has been described by some as ‘an analytical tool’\(^1\) or an ‘analytical procedure’.\(^2\) Accordingly, the aim of this chapter is to understand how, when and why structured proportionality might be considered a useful analytical tool in constitutional adjudication. By identifying the key characteristics of the types of constitutional problems in response to which structured proportionality organically emerged as a judicial technique in the jurisprudence of the Constitutional Court, it may be possible to develop a more complete picture of structured proportionality’s role in constitutional analysis than is currently available in the literature. Ultimately, the insights gained in this chapter will form part of the

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theoretical framework used to evaluate the appropriateness of Australian applications of proportionality in Part II of this thesis.

In the pursuit of its aims, this chapter proceeds in four substantive sections. Section II explores the background against which German constitutional jurisprudence in the modern era emerged. Since the latter was, in many ways a reaction to the failures of the Weimar era and the horrors of National-Socialism which followed, the development of German constitutionalism cannot be understood without engaging with this turn in history. Section III considers the development of the jurisprudence of the Constitutional Court in its early period. It traces the emergence of the specific characteristics of German jurisprudence which gave rise to the widespread acceptance of balancing, and later structured proportionality, as a constitutional method. Section IV then takes a more theoretical turn, examining the conceptual fit between structured proportionality and its application to certain types of ‘balancing problems’. The theory assists in making sense not just of the German jurisprudence, but also in developing a framework that is capable of being applied to other constitutional contexts. In Section V, the various strands explored in the chapter are brought together to theoretically consider the question: when is structured proportionality an appropriate analytical tool in constitutional jurisprudence? Finally, Section VI addresses a key criticism of the theoretical approach adopted in this chapter.

II. THE BASIC LAW

Constitutional jurisprudence in West Germany in the post-war era can be viewed from the perspective of two intersecting but distinct developments. The first was the drafting and ultimate ratification of the new West German constitution – known as the Basic Law. The second was the growth of the jurisprudence of the new Constitutional Court as it interpreted and applied the Basic Law in concrete cases. The first development has generally been understood as a reaction to the failures of

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3 It is important to note that the Basic Law was not given the title of being a ‘constitution’ by its drafters because at the time of its inception it was considered that it was only a transitional law that would be superseded by a new constitution upon the reunification of East and West Germany. As it happened, upon reunification, East Germany abandoned its own socialist constitution and the Basic Law was adopted by the entire unified Federal Republic of Germany: see Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 1997) 30.
the Weimar Republic, which lasted from 1919 to 1933, and the atrocities of the National-Socialist regime which followed.\(^4\) Although the Weimar Republic was governed by a written constitution, post-war German scholars considered that there was at least a partially causal relationship between that constitution’s inadequacies and the collapse of the Republic in 1933. In the reconstruction of West Germany after the Second World War, much of the focus of constitutional scholarship was dedicated to the establishment of a new constitutional order that would directly address the perceived failures of the earlier constitutional system. Thus, many of the Basic Law’s most defining features were in fact intended as ‘corrections’ designed to ‘protect the basic liberties of German citizens’.\(^5\)

Chief amongst these new features was the institution of a new and more far-reaching bill of rights. The Weimar constitution was considered liberal by existing standards and, influenced by the 1791 French constitution, did actually contain a bill of rights.\(^6\) However, these rights were viewed in the nature of aspirational aims largely sitting at the periphery of the constitutional structure.\(^7\) The rights contained within the Basic Law, on the other hand, were placed at the centre of the new order, with human dignity placed at the forefront in Article 1 as an explicit marker of the negation of Nazi ideology.\(^8\) The first paragraph of that provision declares that the ‘The dignity of man is inviolable. To respect and protect it is the duty of all state authority’. The second paragraph goes on to emphasise that ‘The German people therefore acknowledge inviolable and inalienable rights as the basis of every community, of peace and of justice in the world’. Article 1 has been interpreted as ‘the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of all guaranteed rights’.\(^9\) As shall be seen, the centrality of the value of human dignity has been critical to interpretation of the Basic Law and,

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5 Kommers, above n 3, 1.
7 Kommers, above n 3, 33.
9 Kommers, above n 3, 32.
consequently, the Constitutional Court’s view of its own function within the German constitutional system.

The second key aspect of the Basic Law incorporated as a reaction to the failures of the Weimar constitution was the application, for the first time, of unambiguous constitutional limits on the scope of legislative power. In the Weimar era, considerable faith had been placed in parliamentary democracy as a buttress against oppression and tyranny.\(^\text{10}\) Thus, the rights contained within the Weimar constitution were ‘subject in many cases to limitation by simple legislation’.\(^\text{11}\) Even where, textually, constitutional limits were in place, the Weimar parliament adopted a practice of passing legislation contrary to the constitution by a two-thirds vote without seeing the need to formally amend the latter.\(^\text{12}\) The Basic Law, by contrast, was said to ‘remove all doubt on this score by specifying that the Bill of Rights limited legislative, executive, and judicial powers’.\(^\text{13}\)

A third critical inclusion within the new order established under the Basic Law was the creation of a permanent Constitutional Court with constitutionally-entrenched jurisdiction.\(^\text{14}\) Of the three features discussed here, the creation of the Constitutional Court was probably the least transformational and most continuous development from the Weimar era.\(^\text{15}\) During the early 20\(^{th}\) century, there had already been a nascent development towards constitutional judicial review, largely as a result of courts arrogating this power to themselves.\(^\text{16}\) This emerging constitutional judicial review was an extension of principles of state-limitation developed in the context of Prussian administrative law, as discussed in Chapter 2. Nonetheless, the legitimacy of constitutional judicial review during this period was also considerably controversial and ad hoc in its nature, and it appears that individual citizens did not

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\(^\text{10}\) Currie, above n 6, 187.
\(^\text{11}\) See acknowledgement of this in Elfes case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 253/56, 16 January 1957 reported in (1957) 6 BVerfGE 32, II 2(c), where the Constitutional Court noted that under the Weimar Constitution of 1919, ‘the legislature could modify or alter constitutional rights [at will]…The Basic Law, on the other hand, erected a value-oriented order that limits public authority’; see also, Currie, above n 6, 5.
\(^\text{12}\) Currie, above n 6, 7.
\(^\text{13}\) Currie, above n 6, 185.
\(^\text{14}\) Heun, above n 4, 23.
\(^\text{15}\) Hailbronner, above n 8, 3-4; Kommers, above n 3, 7.
\(^\text{16}\) Kommers, above n 3, 6.
possess standing to bring constitutional claims.\footnote{17} Thus, the creation of a specialist constitutional tribunal with entrenched jurisdiction was – to that extent at least – a novel development and part of a stable of enduring institutions seen as necessary for the restoration and protection of the rule of law.

The Constitutional Court was instituted independently of other courts within the federal system and was, as its name suggests, specifically concerned with constitutional matters only. There was, however, a significant debate as to whether its jurisdiction ought to be limited to structural constitutional review (that is, to deciding cases between arms and levels of government) or extended to rights-based judicial review.\footnote{18} In the end, it was decided that it would not operate as a ‘general court of review’, in the sense of exercising ordinary appellate jurisdiction based on errors of law and fact, but that it would conduct both structural and rights-based review when these raised constitutional dimensions. Ultimately, the Constitutional Court’s jurisdiction was established under fifteen distinct heads within the Basic Law, including judicial review of federal-state conflicts;\footnote{19} concrete judicial review, under which a constitutional matter may be referred to the Constitutional Court by a lower court;\footnote{20} abstract judicial review, which permits the referral of a federal or state law by the federal or a state executive government or one third of parliament for an opinion on the constitutional compatibility of the law;\footnote{21} and constitutional complaints.\footnote{22}

Constitutional complaints comprise by far the largest portion of the Constitutional Court’s docket\footnote{23} and have come to be regarded in Germany as ‘an important prerogative – almost a vested right – of citizenship’.\footnote{24} They are therefore worthy of particular attention. Complaints may be commenced by individuals or other constitutionally recognised entities on the ground that their rights under the Basic Law have been violated. They may be filed against ‘any governmental action,
including judicial decisions, administrative decrees, and legislative acts\(^\text{25}\) and can also be made in the course of private law disputes, either where there is some competition between a civil law right contained in ‘the general law’ and an interest directly recognised by the Basic Law, or where there is some conflict between a purely private act (involving no state action) and the Basic Law. The Constitutional Court can grant two remedies against state action that is found to be unconstitutional. It can declare the statute or administrative decree ‘either null and void (\textit{nichtig}) or incompatible (\textit{unvereinbar}) with the Basic Law.’\(^\text{26}\) A declaration of \textit{nichtig} means the state action is immediately invalid, whereas a declaration of \textit{unvereinbar} means that the state action is unlawful but not technically invalid. It is permitted to operate until some remedial action to resolve its unconstitutionality is taken by parliament or the government, as the case may be.\(^\text{27}\) The latter is a frequently granted remedy and is ‘used by the court to soften the political impact of its decisions’.\(^\text{28}\) The Constitutional Court may also avoid making any declaration of unconstitutionality but simply warn that it may void the relevant statute at some future date unless the legislature takes remedial action to rectify the identified constitutional defect. The Constitutional Court has in the past even issued guidance in the form of ‘advice’ as to how defects may be sufficiently corrected.\(^\text{29}\) This latter feature is an active part of the Constitutional Court’s ‘dialogue’ with other arms of government, and particularly parliament.\(^\text{30}\)

### III. POST-WAR JURISPRUDENCE

As with the formal creation of the Constitutional Court itself, there is a debate among German legal scholars as to whether the post-war jurisprudence of the Constitutional Court should simply be characterised as a reaction to the collapse of the Weimar Republic and the rise of National-Socialism, or whether it had a trajectory of its own deriving from pre-war German legal culture. Michaela Hailbronner, in particular, has recently argued that the contemporary ‘success’ of

\(^{25}\) Ibid 15.
\(^{26}\) Kommers, above n 3, 53.
\(^{27}\) Ibid.
\(^{28}\) Ibid.
\(^{29}\) See, for example, \textit{Party Finance Case I}, Bundesverfassungsgericht [German Constitutional Court], 2 BvF 1/65, 19 July 1966 reported in (1966) 20 BVerfGE 56.
\(^{30}\) Kommers, above n 3, 53.
German constitutionalism cannot be solely attributed to the traditional reactionary narrative because: (1) the judiciary itself took part in the commission of Nazi atrocities and in the post-war era lawyers and judges were largely mistrusted; (2) the framers of the Basic Law did not pay much attention to the creation of a constitutional court or to rights review more generally; and (3) an anti-Nazi paradigm, particularly in the form of protection of minority rights, does not feature heavily in the early jurisprudence of the Constitutional Court. On the other hand, others have argued that during this time there was a ‘sharpened…sense of responsibility of constitutional jurists’ which had identifiable impacts on the interpretive methods adopted by the Constitutional Court. Ultimately, in this chapter, an attempt is not made to resolve this debate in favour of either view. The chapter merely notes, as Hailbronner does, that German constitutional jurisprudence appears to be a product of both a deeply embedded legal scientific tradition predating the Nazi era, as well as of the deeper sense of substantive responsibility felt in the aftermath of World War II. It is this fuller account that explains the two distinct, and sometimes contradictory, strands of thought regarding the Constitutional Court’s role and the scope of its jurisdiction that emerge from its jurisprudence, and which have each had a distinct bearing on the development of structured proportionality.

A. The early years of the German Federal Constitutional Court

In the very early years of its operation, shaped by the legal scientific culture in which its members had been trained and socialised throughout the late 19th and early 20th century, the Constitutional Court exhibited a distinct formalist streak. The dominance of ‘legal science’ was said to encourage German lawyers, judges and scholars to ‘envision law as a self-contained, rational, deductive system of rules and norms’. According to this view, the objective of constitutional jurisprudence was to ‘create a science of law marked by its own internal standards of validity’, and to ‘keep law entirely separate from the domains of politics, psychology, and

31 Hailbronner, above n 8, 2-3.
33 Kommers, above n 3, 40.
sociology’. Consistently, the primary method for resolving disputes advocated by constitutional law scholars such as Ernst Forsthoft was ‘by means of the traditional canons of interpretation’.

It is thus somewhat unsurprising that during this period, the Constitutional Court emphasised that it would ‘not substitute its judgment of sound or wise public policy for that of the legislature’. It distinguished ‘sharply between the functions of judge and legislator’ and considered that judicial interpretation should not extend to making laws. It displayed far more comfort with deciding cases involving intergovernmental disputes than with rights adjudication and, for the most part, it granted the legislature ‘a generous margin of error’ and made only ‘modest’ demands of the government. This restrained view of the Constitutional Court’s role is perhaps best summarised by the following observation made by one of its justices, Ernst Friesenhahn, in 1954:

As an independent, neutral body, which renders decisions solely in terms of law, [the Constitutional Court] determines the law with binding effect when it is disputed, doubted or under attack. In doing so, it bears no political responsibility, though its decisions may have great political significance.

A curtailed form of proportionality – that is, not yet in its structured form and still focusing largely on a reasonable relationship between ‘means’ and ‘ends’ rather than balancing – was evident in the Constitutional Court’s jurisprudence even at this early stage. For example, in the Electoral Laws case of 1954, the Constitutional Court was faced with a challenge to Länder (State) electoral laws of North Rhine-Westphalia brought by two political parties – the Gesamdeutche Block

34 Ibid.
36 Kommers, above n 3, 51, citing Saar Treaty case, Bundesverfassungsgericht [German Constitutional Court], 1 BvF 1/55, 4 May 1955 reported in (1955) 4 BVerfGE 157, 168.
37 Kommers, above n 3, 43.
38 Hailbronner, above n 8, 53.
39 Kommers, above n 3, 51.
40 Hailbronner, above n 8, 54.
42 Electoral Laws case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 183/54, 3 June 1954 reported in (1954) 3 BVerfGE 383.
(GB) and the German Reichspartei (DRP). The laws required that parties achieve a quorum of 100 signatures (out of a total of 60,000 voters) before being eligible to contest an election. GB and DRP argued that this put them at a disadvantage compared to parties already represented in the local parliament. It was, they argued, a violation of Article 3 of the Basic Law, which provides in its first paragraph that ‘[a]ll persons shall be equal before the law’.

In finding that the constitutional complaints were not justified, the Constitutional Court noted that the end that the legislature had been seeking to achieve was the avoidance of the ‘danger of the fragmentation of voices which, according to experience, emanates particularly from fluctuating parties which are not of a constant and permanent size’. It reasoned that the signatory quorum was, therefore:

…a suitable means of serving [the law’s purpose]. It does not exceed the limits imposed by the principle of proportionality between purpose and means. Within these limits, the legislature is free from any special provisions of the Constitution.

This kind of analysis has the distinct hallmarks of the approach adopted by the Prussian administrative courts in the 19th century, as considered in Chapter 2. It involves a restrained, ‘efficiency-based’ conception of proportionality. That is, the Constitutional Court engaged in a limited, means ends analysis to ensure that there were ‘no unnecessary costs to rights’ or ‘that sledgehammers [were] not used to crack nuts’. However, the Constitutional Court did not – at least not explicitly – delve into substantive considerations of the normative weight to be attached to competing considerations.

B. The Lüth case and a comprehensive value order

The transitional period of the early 1950s described above has been explained as one in which the Constitutional Court exercised significant caution as it sought to
build its legitimacy.\textsuperscript{47} Bubbling under the surface, however, was a different conception of its role within the constitutional structure of the Basic Law. This conception also had its antecedents in pre-war legal scholarship, particularly in the influential works of Rudolf Smend. In his ‘integration theory’\textsuperscript{48} of the 1920s, Smend argued that the formalist legal scientific method, which had developed largely in the context of private law, was, on its own, a deficient approach to interpreting constitutional law. He reasoned that ‘the constitution’s main purpose was the integration of all forces of the political life’.\textsuperscript{49} Constitutional law must therefore consider and reflect, as its first and primary task, the set of values that underpin the entire, integrated constitutional system.

Towards the late 1950s, Smend’s integration theory started to gain ascendency in post-war German legal thought. During this period, the predominant mindset began to shift as the horrors that had taken place during the War became more apparent and a need for substantive accountability more pressing. As Jacco Bomhoff explains, ‘[i]n the eyes of many…constitutional law was to erect a meaningful obstruction to totalitarianism’.\textsuperscript{50} In order to achieve this, the Basic Law needed to be viewed as ‘“total”, or comprehensive, in its aspirations’.\textsuperscript{51} Smend’s concept of a comprehensive value order, in which there would be no gaps or loopholes open for exploitation, consequently gained significant traction. It was championed by scholars such as Herbert Kruger and Gerhard Leibholz. Leibholz was ultimately appointed to the Constitutional Court\textsuperscript{52} and the idea of a ‘comprehensive value order’ emerged in 1958 as the Republic’s most fundamental principle of constitutional interpretation.

The \textit{Lüth case},\textsuperscript{53} decided in January 1958, has been described by contemporary scholars as ‘the most important decision of the [Constitutional] Court of all time’\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{47} Hailbronner, above n 8, 53.
\item \textsuperscript{48} Kommers, above n 3, 45.
\item \textsuperscript{49} Bomhoff, above n 32, 117.
\item \textsuperscript{50} Ibid.
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} Sweet and Mathews, above n 2, 104.
\item \textsuperscript{53} \textit{Lüth case}, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198.
\item \textsuperscript{54} Hailbronner, above n 8, 60.
\end{itemize}
and a ‘touchstone of German constitutional law’. It is important not just jurisprudentially, but also as a marker of the beginning of the Constitutional Court’s trajectory towards establishing its legitimacy as an independent institution in the German political system. The case concerned a challenge to a decision of a civil law court on the basis that it had wrongly found in favour of Veit Harlan, the director of anti-Semitic film, against Erich Lüth, the Chairman of the Publications Office of the City of Hamburg, who had given a public lecture calling for a boycott of Harlan’s films. The Constitutional Court was tasked with deciding whether the balance that the civil law court had drawn between two competing interests: freedom of expression, on one hand, and protection of reputation against defamation, on the other, was a constitutionally sound one. The first of the relevant interests, freedom of expression, was incorporated into the Basic Law’s Bill of Rights through Article 5. The second, protection of reputation, was embodied in the ‘general law’. Article 5 expressly provided that the rights guaranteed by the Basic Law had their limits in ‘the provisions of the general laws, the provisions of law for the protection of youth, and the right to inviolability of personal honor.’

The great constitutional moment in Lüth, which has had lasting effect, was the Constitutional Court’s legitimisation of the view that the Basic Law is comprehensive in the sense that it creates a constitutional value order, or ‘objective order of values’, which affects all rights and interests, whether public or private. In doing so, the Constitutional Court rejected any contention that the Basic Law was a ‘value-neutral document’. Rather, it considered that the value system created by the Basic Law centred upon ‘dignity of the human personality developing freely within the social community’. It was an express jurisprudential endorsement of Smend’s idea of comprehensive, value-based constitutionalism.

Consequently, the Constitutional Court formed the view that Article 5’s express provision for limitation of freedom of expression by ‘general laws’ was not to be

55 Bomhoff, above n 32, 77.
56 Bomhoff, above n 32, 111.
57 Lüth case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198. See Kommers, above n 3, 363.
seen as a simple case of allowing that right to be restricted by any law that could fall into that category:

The mutual relationship between basic rights and “general laws” is not to be understood as a unilateral limitation on the applicability of the basic right… There is rather a reciprocal effect [Wechselwirkung]…To be sure, as the text makes clear, the “general laws” set limits to the basic right; but they themselves must be interpreted in recognition of the value-setting significance of this right in a free democratic state, and thus their limiting effect on the basic right must itself be restricted. 58

And thus, through the notion of ‘reciprocal effect’ or ‘dialectic’ (Wechselwirkung), 59 the Constitutional Court reached the view that ‘general laws’ and freedom of expression were ‘mutually limiting and constitutive of each other’s meaning’. 60

The centrality of Lüth in marking the beginning of a trajectory in the Constitutional Court’s jurisprudence and its conception of its own legitimacy becomes apparent in the Pharmacy case, 61 decided later in the same year. In the Pharmacy case, the Constitutional Court was faced with a complaint concerning regulations that prescribed certain requirements for the grant of licences to pharmacies in Bavaria. The regulations had been used to deny the complainant, who had been a licensed pharmacist in East Germany, a licence to open a pharmacy in West Germany. On their face, the regulations were in competition with Article 12(1) of the Basic Law, which guarantees a citizen’s right to choose an occupation freely. In finding that the regulations were constitutionally valid, the Constitutional Court observed that the principle of proportionality ‘governed’ the case in the sense that ‘any requirements laid down’ needed to ‘bear a reasonable relationship to the end pursued [i.e. the safe and orderly practice of a profession]’. 62 This kind of means ends analysis reflected continuity with the formalist legal scientific tradition that

58 Lüth case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, 208-9.
59 Bomhoff, above n 32, 78.
60 Ibid.
61 Pharmacy case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) 7 BVerfGE 377.
62 Ibid. See Kommers, above n 3, 277.
had dominated its early jurisprudence. However, the Constitutional Court went on to observe that:

[the individual’s claim to freedom will have stronger effect…the more his right to free choice of a profession is put into question; the protection of the public will become more urgent, the greater the disadvantages that arise from free practising of professions. When one seeks to maximise both…demands in the most effective way, then the solution can only lie in a careful balancing of the meaning of the two opposed and perhaps conflicting interests.]

The application of this new balancing element was distinctly value-laden and a significant divergence from the legal scientific tradition. To undertake it, the Constitutional Court must have felt sufficiently reassured that its engagement with constitutional values would not be seen as an illegitimate move by a weak institution of government. The finding in Lüth that the Basic Law embodied a comprehensive value order, and that the Constitutional Court’s function was to ensure the ongoing stability of that order, was the pathway to this reassurance and new-found confidence.

IV. CONSTITUTIONAL ASSUMPTIONS GIVING RISE TO BALANCING

It may be helpful at this point to pause the historical account to take stock of what had occurred jurisprudentially for readers to fully appreciate how the Constitutional Court went from recognising in the Lüth case that there was a comprehensive value order underpinning the Basic Law to holding in the Pharmacy case that this legitimised some sort of balancing analysis. The Constitutional Court itself did not explain how it arrived at balancing. Furthermore, it could have just continued to apply the traditional means ends analysis that had been adopted, for example, in the Electoral Laws case discussed above.

As we shall see, however, the conceptual leap towards balancing was made possible, and indeed necessitated, because the idea of a ‘comprehensive value order’ embodied a number of substantive assumptions about the nature of

63 Pharmacy case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) 7 BVerfGE 377, 404-5.
constitutions and the interests they recognise. It is the presence of these substantive assumptions, not the overarching idea of a ‘comprehensive value order’ itself, that suggests ‘balancing’, when combined with means ends analysis, as the most appropriate analytical method for dealing with conflicts between interests recognised under the Basic Law.

A. Competing interests must have ‘constitutional status’

The German constitutional system is shaped by a hierarchical set of norms. The Basic Law is the ‘supreme law of the land’ and ‘forms the pinnacle’ of the hierarchy. Ordinarily, norms that belong to ‘lower levels are null and void if they violate higher law.’ As such, principles emanating from the ordinary domain of private law have been viewed as subordinate to constitutional interests, such that ‘no rule of private law may conflict with [the Basic Law], and all such rules must be construed in accordance with its spirit’. There is very little that is controversial about this hierarchical relationship between constitutional and non-constitutional interests, since it is a basic assumption that underpins most legal orders. More importantly for present purposes, the hierarchical system does not leave much room for balancing. As Joseph Raz has observed, when a higher order consideration conflicts with a lower order consideration, ‘the decision is made by excluding the lower-level consideration completely from the balance, rather than by balancing.’

The hierarchy of norms does not, however, fully capture the Basic Law’s operation. There are two further principles that adjust the ordinary hierarchy. The first is the inclusion of express limitation clauses within certain articles of the Basic Law which provide that they may be limited by the ‘general law’. Thus, it has been observed that the interests embodied in statute ‘owe their constitutional relevance

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65 Ibid.
66 Lüth case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, B.1.(1).
69 Article 5 of the Basic Law is a good example. In paragraph 2, it provides that freedom of expression may be limited, inter alia, by ‘the provisions of general laws’.

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partly to the fact that the legislature has appropriated them within the competence granted by the limiting clauses of constitutional rights”.70 In other words, if an interest embodied in legislation falls within the ambit of a constitutional limitation clause, it is said to have some constitutional character which shields it from being defeated *prima facie* by an express constitutional right with which it is in conflict.

The second, and far more esoteric, principle is the concept of the ‘comprehensive value order’ established in the *Lüth* case. This central concept has permitted the Constitutional Court to elevate certain constitutional values ‘to a primordial status from which they could ‘radiate’ throughout this order, filling any potential gaps that might exist between specific provisions’.71 For example, the value of ‘human dignity’ was said in the *Mephisto* case to permeate the entire constitutional system,72 and others have pointed to values of ‘freedom’ and ‘equality’ as having similar effect.73 This ‘radiating’ effect is said to eliminate the need to identify a specific textual link between the Basic Law and the interests under consideration in a constitutional complaint.74 It means that interests not expressly recognised in the Basic Law, such as posthumous rights to defamation remedies, a right to privacy, and a right to control personal information, are, nevertheless, recognised as having constitutional status. When in conflict with express Basic Law rights, these values are not automatically considered inferior to those rights. Rather, they are viewed as ‘matched so that each influences the other’.75 Thus, the Constitutional Court has observed that ‘conflicting constitutional rights of third parties and other legal values of constitutional status are capable, with due respect for the unity of the constitution and the entire order of values it upholds, of limiting limitless constitutional rights in certain circumstances’.76

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71 Bomhoff, above n 32, 106.
72 *Mephisto case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 435/68, 24 February 1971 reported in (1971) 30 BVerfGE 173, C.III.
73 Stolleis, above n 17, 139.
74 Ibid 142.
76 *Obligation to Refuse Service case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR83, 244 and 345/69, 26 May 1970 reported in (1970) 28 BVerfGE 243, 261.
Once the prerequisite of identifying ‘other legal values of constitutional status’ has been met, the analysis proceeds to focus on establishing a ‘dialectical’ relationship between the ‘competing constitutional values’ through balancing. Thus, the Constitutional Court’s position since the Pharmacy case has been that where, in a *prima facie* sense, there are ‘equally legitimate’ objectives being pursued, ‘the resolution can only be found through a thorough balancing of the importance of the opposite and possibly competing interests.’

While it might be tempting to disregard the idea of a ‘comprehensive value order’ operating to elevate non-constitutional interests to a constitutional status as a unique quirk of German constitutionalism, what ought not be disregarded is the more generalisable point that it helps us to understand about balancing. It has been observed that balancing is only appropriate when the values in conflict ‘have the same normative weight or the same formal status’. That is, in order for balancing to have some role to play, the interests in conflict must have the same *prima facie* constitutional rank or status. When interests have a hierarchical relationship to each other that is immediately apparent, such as when one has a constitutional status and another does not, balancing is not needed since the higher interest will simply trump the lower one from the outset. However, when ‘two interests of constitutional rank cannot be interpreted away’, the situation is said to ‘thrust’ judges into ‘a balancing mode’.

**B. Individual ‘rights’ as aspects of public goods and societal interests**

Much global discourse on proportionality proceeds from the assumption that balancing is an appropriate method *only* when there is an interest at stake that can

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77 Ibid.
78 *Pharmacy case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) 7 BVerfGE 377, 405.
80 To be clear, this does not mean that they need to have exactly the same normative value. This is merely a prima facie requirement before any detailed analysis has been undertaken.
81 Sweet and Mathews, above n 2, 87.
82 Ibid.
be described in the language of ‘rights’.\textsuperscript{83} Indeed, such an assumption is entirely understandable since the historical lineage of proportionality in German public law tracks its emergence through the rights-protective function performed by the Prussian administrative courts against the police state, as discussed in Chapter 2. Furthermore, contemporary application of proportionality in Germany and other jurisdictions overwhelmingly takes place within the context of rights jurisprudence.

On the other hand, there is nothing about the way in which proportionality initially emerged in German constitutional law which suggests that the concept has an intrinsic connection with individual ‘rights’ jurisprudence only. It is here that Rudolf Smend’s ideas can again be seen to have been highly influential. In his work, Smend repeatedly referred to the need to develop a set of relationships between competing social interests or public goods. He went to lengths to describe the relevant ‘parameters to be evaluated and compared’ as ‘public’ or ‘social’ goods rather than those having a ‘private’ character.\textsuperscript{84} In this way, Smend downplayed the language of individually-held rights, preferring concepts such as ‘Gemeinschaftswerte (‘communal values’), Allgemeininteresse (‘the general interest’) and gesellschaftliches Gut (‘a societal good’).\textsuperscript{85} as more accurate descriptors of the interests embodied in a constitution. Basic rights that would have been considered in the Weimer Republic and the early jurisprudence of the Constitutional Court as having a distinctly and exclusively individual flavour, such as freedom of expression, were, according to Smend, more appropriately thought of as ‘reflections of underlying public goods’ and therefore as having a ‘social character’.\textsuperscript{86}

\textsuperscript{83} See, for example, Barak, above n 67, 17-128; Sweet and Mathews, above n 2, 75.
\textsuperscript{84} Bomhoff, above n 32, 99.
\textsuperscript{85} Ibid
\textsuperscript{86} Ibid. An excessive focus on the recognition of a constitutional ‘right’ as a precursor to balancing was also cautioned against by scholars in other jurisdictions roughly around the same period. For example, in the United States, Roscoe Pound argued that it was irrelevant to distinguish between interests held by individuals, and the ‘claims and demands’ of human beings ‘in groups or associations or relations’: Roscoe Pound, ‘A Survey of Social Interests’ (1943) 57 Harvard Law Review 1, 1. Indeed, Pound argued, throughout the history of the common law, public policy and wider social considerations have often found judicial expression through the language of ‘fundamental’ individual rights. On this basis, Pound criticised classical legal thought as seeking to elevate ‘individual natural rights’ at the expense of other public and social interests. In Pound’s view, when all competing rights and interests are considered collectively as just interests, predetermined outcomes, without any particularised or contextual consideration of the appropriate balance to be drawn in any given case, can be avoided.
The reconceiving of individual rights as broader interests or ‘public goods’ was both a reflection of the Constitutional Court’s adoption of the notion of a comprehensive value order and a bridge towards balancing as an appropriate method for resolving conflicts between competing interests. On the first count, the idea that the Basic Law was founded on a ‘comprehensive value order’ meant that individual rights were only specific instantiations of that order. Any attempt to give Basic Law rights some meaning in the circumstances of a concrete case had to draw upon the value set from which they were derived – that is, the public goods that justified the recognition of the rights in the first place. Thus, in Lüth, the Constitutional Court went to great lengths to emphasise that freedom of expression was derived from the shared value of ‘conflict of opinion’ which was a ‘vital element’ for the proper functioning of a ‘free and democratic state’. 87

Once the Constitutional Court started embracing the idea of a ‘comprehensive value order’, it attached little analytical significance to ‘rights’ as precursors to balancing. 88 Its reconceiving of individual rights as aspects of shared societal values meant that they did not retain any special status but they were also now subject to ‘concern for other values or public interests’. 89 Indeed, in Lüth, 90 the Constitutional Court emphasised it was concerned with ‘eine objektive Wertordnung’, which has been translated as ‘a balancing of values’ 91 or a ‘balancing of interests’, 92 rather than balancing a ‘right’ against some other type of lesser ‘interest’. Balancing, or weighing values or interests against each other ‘appeared a natural solution to determining their application in concrete cases’. 93 In other words, the recognition of individual rights as also having a broader societal function was what necessitated that they be ‘balanced’ or ‘compared’ with other societal interests also embodying public goods. Of course, in the course of a constitutional complaint, it remains

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87 Lüth case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, B.I.
88 This is what Alison Young has described as applying an interest-based theory of rights, where rights and interests are weighed without ‘automatically tipping the scales in favour of the right’: ‘Proportionality is Dead: Long Live Proportionality!’ in Huscroft et al (eds) above n 79, 43, 51.
89 Hailbronner, above n 8, 119.
90 Lüth case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198.
91 Bomhoff, above n 32, 77 (emphasis added).
92 Currie, above n 6, 181 (emphasis added).
93 Hailbronner, above n 8, 119.
important to identify that one of the Articles of the Basic Law has been engaged, even if only in the general ‘radiating’ sense described above, since this is the trigger for the Constitutional Court to exercise its jurisdiction in a constitutional complaint. However, once that jurisdictional issue has been satisfied, the normative force of an individual ‘right’ has only limited utility to the subsequent analysis.

C. A (qualified) rejection of absolutism

Closely connected with the notion of considering express constitutional rights as mere instantiations of broader societal interests was the rejection by the Constitutional Court of the idea that any particular a priori dominance ought to be accorded to these rights as against other interests. This was quite a different approach to that which had been taken under the 1919 Weimar constitution. For example, in Weimar jurisprudence on free speech, the ‘dominant view’ was that if a general law was directed at speech, it would need to give way entirely to the ‘right’. On the other hand, where a general law was not actually directed against speech, expression had to give way to ‘any other legal interest, however insignificant’. Thus, the scope of the area of freedom accorded to the ‘right’ of free speech was narrowly defined, but within that sphere of narrow operation it was considered close to absolute. The freedom was seen as the ‘rule’, and ‘limitation by the State the exception’. That there ought to be any ‘balancing’ of interests was not an idea that enjoyed widespread support. Indeed, Smend’s critics wrote during this period that freedom of expression is ‘not a right or a value that can be weighed, in a balancing of interests, with other societal goods’.

94 Currie, above n 6, 179, quoting the President of the German Federal Constitutional Court.
95 Bomhoff, above n 32, 101.
96 Currie, above n 6, 179.
97 Bomhoff, above n 32, 101. These views echo the more contemporary approach of Ronald Dworkin, who has argued that ‘rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or do, or not a sufficient justification for imposing some loss or injury upon them.’: Ronald Dworkin, Taking Rights Seriously (Harvard University Press, 1977) xi. Thus, for Dworkin, the constitutional recognition of rights already encompasses a balance – in favour of the right. See also, Ronald Dworkin, ‘Rights as Trumps’ in Jeremy Waldron (ed), Theories of Rights (Oxford University Press, 1984) 153; Young, above n 88, 49; Stavros Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7 International Journal of Constitutional Law 468; Gregoire Webber, ‘On the Loss of Rights’ in Huscroft et al (eds), above n 79, 123.
The *Lüth* Court did not entirely abandon the state-limiting, rights-protective view that formed the conceptual underpinning of rights absolutism during the Weimar era. Indeed, it noted that ‘[i]n no doubt that the main purpose of basic rights is to protect the individual’s sphere of freedom against encroachment by public power: they are the citizen’s bulwark against the state’.  

However, in the Constitutional Court’s view, it was not bound to take a ‘definitional’ approach to construction of the scope of rights that rights absolutism demanded. That is, the Constitutional Court would not define constitutional rights narrowly in order that they could operate as absolute bars to legislation within their limited scope. In its view, such an approach would fail to account for the ‘special significance’ of the values underpinning the Basic Law within the comprehensive value order, of which the Constitutional Court was striving to achieve the fullest possible realisation.

Abandoning rights absolutism, the Constitutional Court took instead the approach of balancing competing interests in context. Through weighing the different interests against each other, by reference to the values that underpinned them and the broader factual circumstances of a case, the Constitutional Court could determine how a conflict between them could be resolved such that they could each be given the fullest possible meaning within normative and factual constraints. To that end, the Constitutional Court in *Lüth* observed:

…the expression of opinion is free in so far as its effect on the mind is concerned; but that does not mean that one is entitled, just because one is expressing an opinion, to prejudice interests of another which deserve protection against freedom of opinion. There has to be a ‘balance of interests’; the right to express an opinion must yield if its exercise infringes interest of another which have a superior claim to protection. Whether such an interest exists in a particular case depends on all the circumstances.

It is necessary, at this point, to point out a qualification that has developed since *Lüth* was decided. Although, generally, the jurisprudence of the Constitutional Court confirms that rights absolutism does not have a place in German

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98 *Lüth* case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, B.1.(1).

99 Ibid B.1.(2).

100 Ibid B.1.(2).

101 *Lüth* case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198, B.1.(3), quoted in Hailbronner, above n 8, 119.
constitutionalism, it has been suggested that the Court does, on occasion, apply certain rights in an absolute way. In the 2006 *Aerial Security Law case*, for example, the Constitutional Court invalidated provisions of the Aerial Security Act that purported to authorise the shooting of a civilian passenger plane in circumstances of a hijacking.\(^{102}\) The Constitutional Court reasoned that the authorisation of military force of this kind infringed upon the guarantee of human dignity in the Basic Law:

…the duty to respect and protect human dignity generally forbids making any human being a mere object of the actions of the state. Any treatment of a human being by the state that – because it lacks respect for the value that is inherent in every human being – would call into question his or her quality as a subject of law, is strictly forbidden.\(^{103}\)

It has been suggested that the approach taken by the Constitutional Court in this case shows that it views the value of human dignity in absolute terms.\(^{104}\) On the other hand, the Court has not always considered the Article 1 value of human dignity in this absolute way. In the 1970 *Interception case*, for example, which concerned the statutory exclusion of legal remedies for telephone tapping, the Constitutional Court held that human dignity would not necessarily be violated if the intrusion into the value was motivated by ‘the necessity to maintain the secrecy of certain measures to protect the democratic order and the security of the state’.\(^{105}\) In such circumstances, the Constitutional Court was willing to engage in a balancing exercise.\(^{106}\)

A resolution of these two seemingly contradictory approaches appears to lie in the recognition that, although the Constitutional Court generally eschews rights absolutism in favour of contextual balancing, there are central areas of some rights that do operate in an absolute way. The Constitutional Court has described this as

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103 *Aerial Security Law case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 357/05, 15 February 2006 reported in (2006) 115 BVerfGE 118, [121].

104 Barak, above n 67, 28.


106 Alexy, *Theory*, above n 70, 63.
‘the absolutely protected core area’\textsuperscript{107} of a constitutional right and in relation to its violation, it has considered that balancing does not have a role to play:

…even outweighing principles of the general interest cannot justify an infringement of the absolutely protected core area of private self-determination; balancing in accordance with the principle of proportionality does not take place.\textsuperscript{108}

Again, the substantive idea of an absolutely protected core area of a right is not necessarily a universal concept that extends beyond German conceptions of how the Basic Law ought to be interpreted. For present purposes, the more important point is to note the clear dichotomy that has developed between absolute and non-absolute rights and the respective role of balancing within that dichotomy. That is, where interests are non-absolute, balancing has an immediately apparent role to play. On the other hand, where an absolute aspect of a right is at issue, balancing is dismissed as inappropriate to deciding the case.

\textit{D. Reasoning from higher to lower levels of abstraction in each case}

The recognition of a comprehensive value order has had further implications for balancing as a judicial method. Under a definitional approach to constitutional interpretation, it is assumed that constitutional rights and interests can be articulated with such precision \textit{a priori} that the contours of their scope can be defined by reference to external limitations on that scope. In such a circumstance, ‘the very definition of the right’ determines how a conflict between it and other interests might be resolved.\textsuperscript{109} A definition of a right or interest in this way is frequently referred to as a ‘rule’.\textsuperscript{110} Where a right or interest can be defined as a rule, there is no need for further judicial balancing since the adjudicative task can be reduced to determining whether the particulars of a case fall within or outside the ambit of the rule. In other words, the expression of a constitutional right or interest might be capable of being refined to the point that it removes the need for any further

\textsuperscript{107} \textit{Tape case}, Bundesverfassungsgericht [German Constitutional Court], 2 BvR 454/71, 31 January 1973 reported in (1973) 34 BVerfGE 238, 245.

\textsuperscript{108} Ibid.

\textsuperscript{109} Young, above n 88, 47. See also, Barak, above n 67, 84.

contextualised weighing of competing interests in the circumstances of a particular case.\textsuperscript{111}

The definitional approach runs into difficulties, however, when constitutional rights and interests are incapable of precise definition in the abstract. This is particularly so when they are drawn from broader amorphous values, such that a particular normative weight cannot rationally be assigned to them outside the specifics of a case. While the language, history, and context of a particular constitutional provision might suggest a broad ‘intermediate’\textsuperscript{112} conclusion as to how the right or interest embodied within it ought to be realised, residual deficiencies and ambiguities are commonplace. In the face of these, it is difficult for definitions of rights to be relied on in the resolution of the issues before a court.\textsuperscript{113}

The Constitutional Court’s adoption of a comprehensive order of values means that its conceptualisation of the rights and interests having constitutional status under the Basic Law exists at a high level of abstraction. This abstract value set is only capable of being concretised when it is considered within the confines of a particular case and its attendant factual and normative constraints.\textsuperscript{114} At this point, a competition between constitutional interests is considered at two levels simultaneously: at the level of the abstract values that generally underpin those interests and at the more concrete level of the specific factual and legal circumstances that gave rise to the competition between them. The latter assists in understanding and giving shape to the former. Thus, for example, in Lüth, the Constitutional Court did not just embrace a consideration of the competing interests in that particular case (that is, at a lower level of abstraction) or of the values (at a less particularised, higher level of abstraction), but both.

The implication that follows from taking this approach is that it necessitates a case-by-case balancing in order to resolve constitutional conflicts. The balancing process allows determination of that of the interests ‘having equal status in the abstract has greater weight in the concrete case’.\textsuperscript{115} The resolution of such a conflict in a

\textsuperscript{111} Young, above n 88, 47.
\textsuperscript{113} Young, above n 88, 60.
\textsuperscript{114} Alexy, \textit{Theory}, above n 70, 51.
\textsuperscript{115} Ibid.
particular case, although generating a ‘rule’ that applies to that particular conflict, does not necessarily produce a generalisable rule that applies to all future cases.

In a fresh case, regard is once again had to both the abstract values underpinning the right or interests engaged and the more tangible instantiations of those interests which help to pin down the contextual meaning of those abstract values. Some of these aspects may overlap with a precedent case, but many are likely to be saliently different and therefore in need of specific consideration through the balancing process.

Aside from explaining why balancing is necessary, a side advantage of this approach is also that ‘it gives courts room for manoeuvre’. That is, they can focus on resolving the particular matter before them without needing to consider how that resolution will impact upon the decision of future competition between interests or how it might narrow the scope of an interest, as would be the case under the definitional approach. In that sense, it is a form of constitutional adjudication that accords well with the restrained, case-by-case approach to judicial decision-making put forward by advocates of judicial minimalism.

V. BALANCING AND STRUCTURED PROPORTIONALITY

A. Failure to establish a theoretical connection

In the previous section, it was argued that the Constitutional Court’s recognition of a ‘comprehensive value order’ underpinning the Basic Law has led to a number of secondary assumptions being drawn about the nature of constitutional interests and their interaction with each other. These include the notion that constitutional rights

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116 This is described by Robert Alexy as a ‘conditional relation of precedence’: Ibid 52.
117 Ibid 50. Cf Alison Young, who is of the view that balancing is only necessary when rights have not yet been defined in the abstract, but that once that process is complete, balancing is no longer necessary: Young, above n 88, 62.
118 So, for example, in the Lebach case, the Constitutional Court observed that neither of the constitutional values in tension in that case could ‘claim basic precedence’ but rather that ‘one must decide in the light of the characteristics of such cases and the circumstances of this case which interest has to give way’: Lebach case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 536/72, 5 June 1973 reported in (1973) 35 BVerfGE 202, 219, 225.
120 See, for example, Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard University Press, 2001).
have no particularly elevated status vis-à-vis other interests that also have some constitutional status, that rights are not absolute and that conflicts must be decided by considering how underlying values are instantiated within the specific particulars of a given case. In the wake of these assumptions, balancing on a case-by-case basis is an appropriate approach to adjudicating competition between constitutional interests.

It is commonly taken for granted that proportionality analysis naturally follows when there is a need for balancing. For example, Jacco Bomhoff has observed that proportionality ‘is often discussed alongside balancing, both by courts and in academic literature, and is generally seen as similar to, or more precisely as encompassing, balancing as an analytical process.’121 Others have asserted, simply, that balancing gives rise to a ‘structural need for proportionality in its intrinsic sense’.122 Indeed, despite the Basic Law’s noticeable silence on the matter,123 the Constitutional Court has also accepted proportionality as a fundamental constitutional principle ‘as if it could be taken for granted’.124 It has frequently made connections between proportionality and balancing, but has not provided much clarity as to exactly why it is that the former follows from the latter. The jurisprudence of the Constitutional Court in the 1960s is replete with incomplete theorising on this question. After acknowledging the existence of a ‘comprehensive legal order’ in Lüth, and applying the necessity and balancing stages in the Pharmacy case, the Constitutional Court reflected on these recent developments in the Handicrafts regulation case of 1961, where it observed:

The “step theory” developed [in the Pharmacy case] is the result of a strict application of the principle of proportionality to an intervention in professional freedom [guaranteed by Article 2(1) of the Basic Law]. It proceeds from the insight that, according to the order of the Basic Law, the free human is the highest legal value and he or she must also be given the greatest possible freedom in the choice of a career, so that this freedom may be restricted only to the extent necessary to the common good. From a basic presumption of freedom…

121 Bomhoff, above n 32, 19.
123 Currie, above n 6, 309.
there is also the principle that interventions are only justified at the ‘stage’ which entails the slightest restriction on the individual’s professional freedom. In order to decide on the admissibility of a concrete statutory restriction on the freedom to work, there is therefore a need to balance the conflicting interests of the individual and the whole.\textsuperscript{125}

The Constitutional Court’s observations acknowledge some connection between proportionality and the idea that constitutional rights ought to be restricted as little as possible. But the Constitutional Court’s final reference to balancing the ‘individual and the whole’ sheds little light on exactly how proportionality might aid in achieving this balance.

Further elliptical justifications for proportionality were offered in a 1965 decision of the Constitutional Court:

\begin{quote}
In the Federal Republic of Germany the principle of proportionality is enshrined in the Constitution. It emanates from the principle of the Rule of Law, and, in fact, from the very essence of the basic rights themselves which, since they are an expression of the general right of freedom of the citizen as against the State, may only be limited by the authorities in so far as is indispensable in the protection of the public interest.\textsuperscript{126}
\end{quote}

The passage above seems to suggest that proportionality emanates from the ‘rule of law’. It is possible that the reference to rule of law, \textit{Rechtsstaat}, was an attempt to draw a connection with 19\textsuperscript{th} century proportionality concepts discussed in Chapter 2. Proportionality was seen then an instrument of the rule of law to achieve ‘restraint on state action’.\textsuperscript{127} Yet as David Currie has observed, ‘[j]ust what proportionality has to do with the rule of law the Court has never explained’.\textsuperscript{128} Dieter Grimm has further speculated that perhaps the Constitutional Court did not elaborate on the connection because it did not predict that proportionality would, in time, become so central to German constitutional jurisprudence.\textsuperscript{129}

In any case, it seems clear that the Constitutional Court’s initial turn to general proportionality concepts was not an analytically rigorous response to the need for balancing. Rather, the application of proportionality to balancing problems appears

\textsuperscript{125} 13 BVerfGE 97 [1961] (Handicrafts regulation case), C.I.
\textsuperscript{126} 19 BVerfGE 342 [1965], 348.
\textsuperscript{127} Hailbronner, above n 8, 69.
\textsuperscript{128} Currie, above n 6, 309.
\textsuperscript{129} Grimm, above n 124, 386.
to have been, on the part of the Constitutional Court at least, largely an intuitive and pragmatic exercise. In a legal system that until the 1960s had been dominated by a cultural adherence to the legal scientific method, however, this kind of intuitive turn to balancing and proportionality raised serious concerns. For example, in 1958, Ernst Forsthoff expressed consternation that the Constitutional Court's approach in \textit{Lüth}, and in particular its reference to ‘value balancing’, no longer represented the traditional German legal scientific method, but had now entered the domain of social science.

Others, like Roman Herzog, were less concerned with the ‘balancing’ aspect of the Constitutional Court’s approach, which they viewed as inevitable, and were more worried by the unstructured nature of that balancing. Herzog in particular suggested that the balancing process should therefore proceed in two separate stages: ‘In a first stage, the Court should only look at the value of the competing ‘\textit{Rechtsguter}’ (‘legally protected values or interests’) in the abstract. A second step should then take into account what Herzog called the ‘\textit{Gefahrenintensität}’, the degree to which the abstract value was threatened in the circumstances of a particular case’. This kind of staged analysis – which was largely an appeal for greater order and structure – is said to be a ‘clear precursor to the work of authors who increasingly came to see balancing as related to, or as part of, a comprehensive three-step proportionality model’. Indeed, Herzog later became President of the Constitutional Court and influenced its decisions in this very direction.

Over time, then, the pragmatic need to address a constitutional conflict requiring a balancing of value-laden interests merged with a desire for methods that would meet German legal culture’s demands for structure and scientific rigour. As will be discussed in greater detail in Chapter 4, proportionality arose out of ‘two rather different strands of German law: one more liberal and formalist, the other anti-formalist and activist’. The result of the compromise between these two modes of jurisprudence is the kind of staged, structured proportionality that is associated

\begin{footnotesize}
130 This supports Michaela Hailbronner’s view that the Court’s adoption of proportionality did not arise from any ‘deep theoretical point about the nature of rights’: Hailbronner, above n 8, 119.
131 Bomhoff, above n 32, 87.
133 Ibid 89.
134 Hailbronner, above n 8, 118.
\end{footnotesize}
with German constitutional law today. Although this innovation did not arise out of any single, deep theoretical movement, the Constitutional Court’s proportionality project has nonetheless, and rather fortuitously, been an enduring success in both German constitutional jurisprudence and as a comparative export. This fact alone suggests that what was largely an intuitive jurisprudential development is, nonetheless, capable of being theoretically grounded, if only in retrospect. As David Beatty asserts, the spread of proportionality to constitutional courts around the world ‘attests to the integrity of its derivation’.  

**B. A theoretical explanation**

In the vast and burgeoning literature on proportionality, there remains only one robust theoretical account which thoroughly explains the connection between balancing and proportionality: that offered by Robert Alexy in his seminal work in this field. Alexy’s structural theory has relatively quickly gained canonical status in German constitutional scholarship and in global literature. It has been described as ‘one of the most penetrating, analytically refined, and influential general accounts of constitutional rights available’. Even Alexy’s critics have conceded that it is at present ‘the most influential and sophisticated theory of proportionality’.  

Alexy’s analysis is a continuation of the Germanic legal scientific tradition of seeking ‘constitutional clarity’ and ‘conceptual-systemic clarification’. It is therefore the product of a deep understanding of the workings of German constitutionality and the role that balancing plays within that system. In that sense, it is a ‘reconstructive account’. Since Alexy’s theory was developed specifically

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135 Ibid 119.
136 Beatty’s claim in full is that ‘The fact that every major court with the power to review the decisions of the two elected branches of government has employed its pragmatic method of analysis albeit with varying degrees of commitment, and often under different names, attests to the integrity of its derivation’: David Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 162.
137 Alexy, *Theory*, above n 70.
139 Kumm, above n 110, 596.
141 Alexy, *Theory*, above n 70, 16.
142 Kumm, above n 110, 575.
in response to and as a theory of the constitutional rights contained in the Basic Law, it might be tempting to dismiss its relevance to other contexts, such as where the balancing problem arises in the course of conflicts between non-rights. However, as Alexy himself acknowledges, his theory is more generalisable than as a simple and narrow account of German constitutional jurisprudence. The reasons for this will be explained below.

i. Rules and principles

There are two key concepts on which Alexy’s theory turns: the notion of ‘principles’ and the idea of ‘optimisation’. Both must be understood before the relationship between balancing and proportionality can be properly appreciated. The best way to understand the concept of principles is by juxtaposing it to the notion of ‘rules’. Both principles and rules are types of constitutional norms. In legal scholarship, principles are commonly distinguished from rules by the level of generality or abstraction at which each are expressed: principles are said to be expressed at a higher level of generality or abstraction while rules are formulated at a more concrete level. Alexy suggests that a better way of distinguishing between rules and principles is to look at how they operate when they are in competition. Rules are definitive in what they command. They require a particular outcome. The application of a rule will always result in a particular conclusion being reached unless an exemption to the rule is accepted and applied instead. Thus, when a rule comes into conflict with another rule, the only way to resolve the conflict is to decide which rule is superior in the circumstances. The superior rule will be applied, and the other will not (i.e. an exemption will be applied to the second rule). Although a choice needs to be made as to which rule is superior, no balancing is necessary.

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143 Alexy, Theory, above n 70, 47-8. It should be acknowledged that part of Alexy’s theory rests on the normative claim that ‘constitutional rights’ are principles. However, this part of his analysis is not central to the considerations of this thesis. This is because here we are not looking for a theory that explains the nature of ‘rights’, but rather the connection between a certain type of constitutional jurisprudence and a certain type of analytical tool, structured proportionality. Thus, the analysis here is focused on identifying ‘principles’ rather than substantiating whether constitutional rights can generally be classed as principles.

144 Alexy, Theory, above n 70, 45. For this type of reasoning, see, for example, Frederick Schauer, ‘Prescriptions in Three Dimensions’ (1997) 82 Iowa Law Review 911. Schauer concludes on the basis of his analysis that there is ‘no single norm-type properly designated as a principle’. See also, Kumm, above n 110, 577.

145 Alexy, Theory, above n 70, 49.

146 Ibid.
required. The range of possible outcomes of the conflict is binary, and the task of judges in judicial reasoning is to decide which rule to prioritise.

Principles, on the other hand, suggest compelling reasons for reaching a particular conclusion but do not command that that particular conclusion must be reached. Instead, principles are inherently subject to compromises and they are ‘characterized by the fact that they can be satisfied to varying degrees’. 147 When principles come into conflict with other principles, each can be realised to a fuller or lesser extent. Thus, if a principle is realised more than a competing principle, the competing principle will be realised commensurately less. Prima facie, neither principle is fully excluded from being realised by being in competition with another principle. 148 Equally, neither principle can be fully realised when in competition with another principle. The range of possible outcomes from the conflict is non-binary or linear. Dealing with a conflict between principles inherently involves balancing, because the competing principles need to be weighed and a point on the linear scale needs to be selected. That is, the task of the legislature is to choose a position on the linear scale that, in its view, represents the best or ‘optimal’ compromise between the two principles. The task of the judiciary is to review (or ‘supervise’) the selection made by the legislature and ensure that it has not selected a position that is so sub-optimal that it can no longer be regarded as constitutional.

**ii. Optimisation**

Optimisation is the most desirable outcome on the scale of linear outcomes possible in a conflict between two principles. It is desirable because it is the point at which both principles in conflict have been realised to the fullest extent possible. At this point, there may be some confusion, because if the two conflicting principles have a commensurate relationship with each other, then, in theory, any point on a linear scale will represent a maximisation of the aggregate realisation of both principles. For example, if Principle A is 80% realised because Principle B is 20% realised, then the aggregate realisation between them will be 100%. If Principle A is only

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148 Unlike a competition between a principle and a rule, in which the principle will be excluded by the operation of the rule.
50% realised and Principle B is also 50% realised, then the aggregate will still be 100%. So, what is the point of optimisation?

Optimisation recognises that the balancing between the two competing principles doesn’t take place in a vacuum where Principle A and Principle B are equally valuable (normatively speaking) and equally realisable (factually speaking). Rather, this is a theory that is to be applied to real conflicts between constitutional norms. In real conflicts, there are external constraints that modify the assessment of whether the point on the linear scale that that has been selected is the most optimal one. In particular there are two forms of external constraints: what is legally/normatively possible and what is factually possible.

So, for example, if in a constitutional system Principle A is normatively twice as valuable as Principle B, then this adjusts the point of optimisation. If Principle A is realised only 10% because Principle B is realised 90%, then this doesn’t fit with the assumption that Principle A is normatively worth twice as much as Principle B. Equally, if it is said that Principle A should be realised 40%, and Principle B should therefore be realised 20% (because it is worth half as much), then the aggregate realisation of both principles is only 60%, rather than the full 100%. The aggregate realisation has not been maximised. In both of these scenarios, a sub-optimal position on the linear scale has been chosen.

Thus, to fit the normative assumption and to maximise the aggregate, Principle A must be 66.7% realised and Principle B must be 33.3% realised. It is only then that Principle A is given a realisation that reflects that it is worth twice as much, normatively, as Principle B and the aggregate realisation of both principles remains 100%. Thus, optimisation tells us – in theory – where the most desirable outcome on the linear scale is given normative possibilities. 149

Similarly, if it is said that, given real-world factual circumstances and constraints, Principle A is only ever realisable up to 40%, then this means that Principle B must be realised up to 60% in order to still achieve the maximum aggregation of 100%. If principle B is still only realised up to 40%, the maximum aggregation of the

149 Alexy, Theory, above n 70, 67.
realisation of the two competing principles is only 80%. There is latent capacity to realise Principle B to a greater extent and this capacity is, in effect, being wasted. Optimisation thus points to where the most desirable outcome on the linear scale is given the range of factual constraints that operate within a particular problem.¹⁵⁰

When applied to a real-world scenario, optimisation offers a standard by which to assess whether the balance that has been struck in that particular scenario, with all its real-world constraints, is the most desirable (‘optimal’ or ‘maximised’) one. In this sense, it is like a sophisticated version of the Golden Ratio discussed at the beginning of Chapter 2. It is an external standard by which the balancing process can be assessed. In the course of judicial review, this is a handy way to decide legislative validity when a law that has constitutional status is competing with another constitutional interest. If either interest could be realised more than it is, then invalidation of the law seems an appropriate outcome since, in effect, the constitution itself is not being realised to the fullest degree possible. Through invalidation the courts are saying that the legislature could do better in ensuring that, allowing for normative and factual constraints, all constitutional interests are maximised as much as possible. This is, in itself, a normative assumption about the role of judicial review. It is, however, a highly defensible one given a fundamental task that courts have is to uphold and maintain the constitution and the system it creates.

iii. Optimisation, balancing and structured proportionality

The benefit of the structured proportionality set of tests is that they heuristically guide us to the point of optimisation in any given conflict between two sets of principles without having to resort to complex mathematical formulae. In other words, through verbal reasoning, they direct the balancing exercise towards optimisation given the factual and normative constraints on that exercise. To these ends, the first stage – the suitability test – operates as a threshold screen, which renders the subsequent tests logical. The second stage – the necessity test – is focused on finding a position of factual optimisation. And the third, and final, stage – the strict proportionality test – aids in finding a position of normative

¹⁵⁰ Ibid 67-8, 397-8.
optimisation. The following explanation shows how these sub-tests identify the point of optimisation (and therefore the line between legislative validity and invalidity) in the ordinary course of judicial review of legislative action.

The *suitability test* asks whether the law in question is rationally connected to a legitimate end. The ‘legitimate end’ here can be understood as the relevant principle that underpins the law, or which the law is seeking to achieve through concrete means. The suitability test is therefore attempting to screen out any laws that are not actually directed towards the principle (or end) that is ostensibly put forward as its rationale. Laws of this kind are considered ‘disproportionate’ because, although they do nothing to further one of the interests being balanced, they nevertheless impose a cost or restriction on the competing interest. Such a position is sub-optimal.  

In some jurisdictions or contexts, the suitability test is further broken down into two sub-tests. Some scholars describe it as having a ‘legitimacy’ stage, at which the court will determine whether the end to which a measure is directed is ‘constitutionally-authorised’, and a separate ‘suitability’ stage, which checks that there is a rational connection between the end and the means adopted. Whether structured as one or two tests it is important to note that the ‘suitability’ stage is not emphasised in the German version of proportionality, or as Kiefel CJ has observed extra-curially, it ‘does not usually assume particular significance’. There appear to at least two reasons for this. The first is particular to the drafting of the Basic Law. As Donald Kommers has observed, ‘[b]ecause rights in the Basic Law are circumscribed by duties and are often limited by objectives and values specified in the constitutional text, the Constitutional Court receives considerable

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152 Sweet and Mathews, above n 2, 75; Hailbronner, above n 8, 117.
153 Grimm, above n 124, 388.
154 Susan Kiefel, ‘Proportionality: A Rule of Reason’ (2012) 23 *Public Law Review* 85, 88. However, it ought to be noted that it is not complete unknown for the German Federal Constitutional Court to hold that a provision is invalid on the basis of failing the suitability test. For example, in *(Falconry case)* the Court held invalid a provision that required falconers to prove knowledge of firearms before becoming eligible for a falconry licence. The Court held that the purpose of the provision (to ensure that falcons were treated properly) was legitimate, but that requiring falconers to have knowledge of firearms was not rationally connected to this purpose: *Falconry case*, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 290/78, 5 November 1980 reported in (1980) 55 BVerfGE 159.
guidance in determining the legitimacy of a state purpose’. It is therefore not commonly presented as a contentious issue in proceedings. The second reason is that the Constitutional Court’s jurisprudence has adapted to accept that ‘in a democracy the legislature is entitled to pursue any purpose, provided that it is not excluded by the constitution’. Thus, it will be a rare case where a law is said by the government to be pursuing a particular purpose when it is indeed not pursing that purpose. For these reasons, in practice, this part of the test performs little evaluative function in German constitutional law. It merely ensures that there is a rational connection between the means and the ends of a collective interest, such that the more substantive tests that follow are rendered logical. This is not to say that the ‘importance’ of the relevant statute is not considered, but this analysis is left to the final stage of ‘strict proportionality’. In German applications of proportionality analysis, then, it is the last two stages – necessity and strict proportionality – that largely tend to account for the invalidation of legislative action. This does not, however, deny the theoretical function that the ‘suitability’ test is capable of performing as part of the balancing process.

The necessity test asks whether the law in question interferes with a competing principle to the smallest degree possible given the range of factual constraints. If there is another means of realising the principle/end pursued by the law to the same degree which has a less restrictive effect on the competing principle, then it is possible to say that the law in question is not optimised since it is possible to realise the competing principle to a greater degree without imposing a greater cost on the other. The optimal position would be where the law in question realises the principle/end that it is seeking to pursue (through a particular means) and the principle that underpins the opposing interest is also realised to the greatest degree. Thus, if there are no means of achieving the same end/principle that are

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155 Kommers, above n 3, 46.
156 Grimm, above n 124, 388.
157 It has for this reason been described, along with legitimate purpose test, as ‘threshold criteria which mark out the domain of reasonable courses of action: any decision not capable of pursuing a legitimate aim is patently unreasonable’: Rivers, above n 45, 195.
158 Ibid.
159 Hailbronner, above n 8, 118; Cohen-Eliya and Porat, above n 122, 18-9.
160 Alexy, Theory, above n 70, 399.
161 Ibid 68.
less restrictive on the competing principle, a position of optimisation has been reached and the law will be considered valid. Otherwise, it is invalid.

Finally, the strict proportionality test asks whether, having passed the first two stages, the law in question still imposes a cost on the competing interest that is too high in light of the importance of the principle/end that it is seeking to pursue. Alexy suggests that there are three stages to this analysis.\(^\text{162}\) First, the court must evaluate the degree to which each principle has been interfered with by the realisation of the other. Second, the court is required to engage with substantive notions of the value of the principle/end that underpins the law and its competing interest, respectively, and assign a value to each. Third, once the degree of interference has been assessed and relative values ascribed, the court must decide where to set the balance between the two principles such that the balance reflects both of these dimensions. If the principle/end that the law is seeking to pursue is being realised to a degree greater than its relative importance compared to the other competing principle would suggest it should be, then it is not optimised. Another way of thinking about this is to say that, given the relative importance of the two principles that are in competition, does the cost to one principle justify the gain to the other? If the answer is yes, the law is not optimised and will be held invalid. Otherwise, it will be valid.

As the above analysis shows, the connection between balancing and structured proportionality is, analytically, a very tight one. The sub-tests of structured proportionality guide a decision-maker through the balancing process such that an optimal outcome can be identified: the point at which two competing principles are each realised to the greatest degree possible given real-world factual and normative constraints.

\(^{162}\) Ibid 401.
C. The ‘balancing problem’

Alexy’s analysis proceeds in the following way:

1. When deciding constitutional complaints involving the Basic Law, the Constitutional Court is engaging in an attempt to resolve competing principles.
2. Principles by their very nature do not automatically override each other — when they compete, they must be weighed and a balance between them found.
3. Optimisation provides a standard for assessing whether the balance that has been reached in any given case is the optimal one (i.e. the one that represents the maximum realisation of both competing principles given factual and normative constraints).
4. Proportionality provides us with a method for finding the point of optimisation.
5. The Constitutional Court can invalidate a law that represents a non-optimal point of balance between the two competing principles.

Thus, the theory hinges on the notion that the Constitutional Court is engaged in balancing principles and not something else.163 If the theory is to be applied to other courts and other constitutional systems, how is it possible to know that they, too, are engaged in a balancing of principles and not something else? There are many different epithets that can be used to describe principles. Alexy notes that we can use the ideas of ‘duty’, ‘requirement, ‘constitutional right’, ‘claim’, ‘interest’,164 and probably most usefully, the ‘values’ that underpin the recognition of a right or interest.165 However trying to pigeonhole the competing norms at play in any given

163 It is for this reason that Stephen Gardbaum has observed that ‘Robert Alexy’s rational reconstruction of the structure of constitutional rights in Germany may perhaps be recharacterized as presenting a conditional justification of balancing: if constitutional rights are conceptualized as principles to be optimized, and if certain non-constitutional rights claims are also granted this same status, then balancing is unavoidable or necessary.’: Gardbaum, above n 79, 87 fn 37.

164 Alexy, Theory, above n 70, 51.

165 Indeed, Alexy explains principles in this way himself, observing that there is ‘yet another term for what is to be balanced: ‘constitutional values’”: Alexy, Theory, above n 70, 55, and ‘Just as one can speak of competing principles and a balance between principles so also one can speak of competing values and a balance between values…” Accordingly, statements of the Federal Constitutional Court about values can be reformulated in terms of principles and vice versa without loss of meaning.” at 86. Alexy does however go on to draw a technical distinction, which is of limited utility to the present analysis: see 92-3 for a summary of the distinction in a nutshell.
case into one of these descriptive categories is liable to be confusing and of limited conceptual utility. Thus, as discussed above, the best way to capture what principles are is to understand what they are not. And they are not ‘rules’ because they do not require a definitive outcome to be reached.166

And this is where it is necessary to return to the assumptions made by the Constitutional Court identified in Section IV of this chapter, which gave rise to the need for balancing in the first place. From a theoretical perspective, it is now possible to understand the reason why they gave rise to such a need: each ensured that the Constitutional Court did not characterise constitutional complaints as conflicts between rules, or conflicts between rules and principles. Rather, balancing has arisen when constitutional complaints have been viewed by the Constitutional Court as conflicts between principles. It is now possible to see how each assumption has operated in this way:

1. **Acknowledging that competing rights or interests must have a constitutional character** – the Constitutional Court has observed that rights or interests that come into conflict with rights expressed in the Basic Law must have some constitutional character. Without a status that derives from the Basic Law itself, the competing right or interest sits lower in the hierarchy of norms, while rights or interests expressly recognised in the Basic Law sit higher. In such circumstances, express Basic Law rights or interests operate like ‘rules’, overriding lower order norms. Where, however, *both* sets of competing rights or interests have a constitutional character, they each operate like ‘principles’, giving rise to the need for balancing.

2. **Recognising individual ‘rights’ as aspects of public goods and broader societal interests** – by recognising that individual rights are drawn from, and are aspects of, broader public goods and societal interests, the Constitutional Court has ensured that these rights are properly viewed as reflecting wider ‘principles’ (or values) rather as operating as more specific ‘rules’ divorced from those values. When they conflict with other rights or societal interests with

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166 Alexy notes that rules ‘insist that one does exactly as required, they contain a decision about what is to happen within the realm of the legally and factually possible’: Alexy, *Theory*, above n 70, 57.
constitutional status, they do not automatically override those rights or interests. Rather, the underlying reasons (or principles or values) that underpin the rights suggest good (but not definitive) reasons for realising them to the fullest degree possible given factual and normative constraints. A balancing is therefore required to resolve any conflict with other rights or interests that possess the same properties.

3. **Rejecting rights absolutism** – the Constitutional Court has held that the mere recognition of an individual right in the Basic Law does not *prima facie* give it a higher hierarchical status than other public goods. Individual rights in the Basic Law therefore do not operate as ‘absolute trumps’ over other rights or interests that also have constitutional status, and therefore do not operate as ‘rules’ which must be followed.\(^\text{167}\) Again, balancing is required in order to resolve the conflict.\(^\text{168}\) The exception is where there is a conflict with the inviolable core of a Basic Law right, in which case the Constitutional Court has applied the ‘core’ absolutely – that is, like a rule not a principle.

4. **Reasoning from higher to lower levels of abstraction in each case** – in order to give full effect to the underlying values that underpin the Basic Law, the Constitutional Court has tended to avoid using definitional approaches to determine the scope of rights in the abstract. Definitional approaches lead to the creation of ‘rules’ through the delineation of the scope of a right (or interest) and the designation of its absolute operation within that scope. However, rules defined in this way tend to be narrow in scope, and their application tends to become divorced from the underlying values that give substance to the rights (or interests) defined by them. This may not be problematic in some cases.

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\(^{167}\) See, for example, David Beatty’s observation that rights hold ‘no special status’ when proportionality is engaged: Beatty, above n 136, 170-1. Similarly, Kai Moller asserts that the ‘challenge that proportionality in general and balancing in particular present to traditional philosophical theories of rights is that they do not recognize any special normative force of rights, for example by regarding them as trumps or side constraints’: Moller, *Rights Inflation*, above n 79, 156.

\(^{168}\) It is for this very reason that so many of proportionality’s critics take umbrage at proportionality’s stance on constitutional ‘rights’. As Alison Young has put it: ‘To apply a test of proportionality to human rights is to reduce rights to mere interests, requiring them to be balanced against other “rights” and interests. But the precise nature of a right means that it cannot be balanced in this manner: rights override other interests. To apply a test of proportionality, therefore, is to undermine the very purpose of possessing a right in the first place’: Young, above n 88, 44. Similarly, Gregoire Webber asserts that proportionality ‘reduces rights to defeasible interests, values or principles and evaluates the justification for interference with rights’: Webber, above n 97, 123-4.
However, where there are rights or interests which can only sensibly be given meaning by reference to their underlying values, which tends to be the case for constitutional norms by their very constitutive nature, the definitional approach is not suitable. In these circumstances, the Constitutional Court has eschewed the application of definitional rules in favour of a case-by-case balancing approach that ensures that each conflict is resolved by balancing principles in light of both the constitutional values that underpin them and the circumstances of the case at hand.

These constitutional assumptions have reinforced the Constitutional Court’s implicit position that complaints brought under the Basic Law almost always involve conflicts between principles, not rules. Abstracting from these assumptions, it is possible to conclude that a conflict between principles arises when there is a (i) conflict between two sets of rights or interests; (ii) each of which has the same prima facie normative (constitutional) force; (iii) neither of which is absolute; and, (iv) at least one of which is incapable of being defined in the abstract. When these criteria are fulfilled, the constitutional problem that arises (a ‘balancing problem’) conforms to a conflict between two principles. Structured proportionality, as a method of undertaking balancing between principles, is a useful analytical tool in this context.

One final point must be made here. In deciding exactly what factual and normative constraints are applicable in a given case (that is, the real-world constraints that dictate where the optimal balance between two competing principles lies), judicial discretion needs to be exercised. So, for example, to decide that the same end could be achieved through a different means that is less restrictive of the competing principle (the necessity test) requires judicial discretion to be exercised regarding whether a different means could actually achieve the same end. Similarly, deciding that one principle is, for example, twice as important as another in applying the strict proportionality test requires judicial discretion to be exercised as to why it is that greater normative value ought to be given to one competing principle relative to the other. It is in this sense that proportionality – while it is analytically very powerful in balancing situations – raises a set of concerns in constitutional systems that are uncomfortable with wide judicial discretion.
Structured proportionality’s demand for judicial discretion points to why a number of courts – including the Prussian administrative courts, the German Federal Constitutional Court in its early years, the Canadian Supreme Court, and the House of Lords – have preferred to apply the curtailed means ends form of proportionality rather than the full three/four-part structured proportionality test. Because means ends analysis, which stops at the necessity stage, only engages with factual rather than normative constraints on the balancing problem, it reduces the degree of judicial discretion that needs to be exercised. For courts operating within a constitutional culture that prefers high levels of judicial restraint, or for courts that are yet to establish their own legitimacy and authority, such a curtailed form of addressing balancing questions may be appealing. On the other hand, as was considered in Chapter 2 and is now more fully capable of appreciation under the theoretical lens presented in this chapter, means ends analysis is by its nature an incomplete form of analysis when a conflict which requires the balancing of principles, or a ‘balancing problem’, arises.

VI. INCOMMENSURABILITY

Although Alexy’s theory offers by far the most satisfactory explanation of the relationship between proportionality and the ‘balancing problem’, it is not free of criticism. The most persistent is that the theory (and proportionality with it) is flawed because, at the last stage, it requires a decision to be made between incommensurable rights or interests. It requires courts to choose between, for example, the degree to which freedom of expression can be justifiably lost in the pursuit of protection of persons against racial discrimination, even though the values underpinning freedom of expression are fundamentally different from, and therefore incomparable with, those underpinning anti-discrimination. As Justice Scalia put it, it requires the length of a line to be compared with the heaviness of a rock.

169 Bernhard Schlink, a German critic of structured proportionality, has also suggested that it be undertaken without the final strict balancing stage: Abwagung im Verfassungsrecht (Duncker & Humboldt, 1976) 192-219. For a discussion and critique of Schlink’s work in English, see Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, German and South Africa (Cambridge University Press, 2017) 50-54.

A. The ‘strong’ incommensurability objection

There are two different forms of the ‘incommensurability objection’, one being slightly more sophisticated than the other. The first form simply suggests that there is no rational basis for choosing between two competing interests at the last strict balancing stage of proportionality because such a task would be akin to comparing apples with oranges.\(^{171}\) It argues that attempting to reduce the qualities of each competing interest to a common standard or ‘shared metric’ is also fraught with difficulty since the irreducibility of the values that underpin these competing rights or interests is what gives rise to the need for balancing to begin with.\(^{172}\) Since there is, therefore, no rational basis for conducting judicial balancing, to attempt to do so is inimical to the rule of law and involves ‘arbitrary rule by judges’.\(^{173}\)

This form of the incommensurability objection is often dealt with fairly swiftly by proportionality’s proponents, to the chagrin of some of its critics.\(^{174}\) It has been observed that, generally speaking, the balancing of incommensurate interests is essential to the judicial role in numerous areas.\(^{175}\) For example, Roscoe Pound long ago observed that the common law has always recognised a role for balancing competing public policy considerations, masked behind the concept of common law rights.\(^{176}\) The literature and jurisprudence is replete with other examples, such as the awarding of damages in civil cases where the personal injury sustained in an accident is entirely incommensurate to a monetary recompense.\(^{177}\) Thus the problem of incommensurability may be considered inherent to judicial decision-making itself, and to that extent is endemic rather than intrinsic to one particular judicial method. Indeed, if we are to accept Jeremy Waldron’s argument, such reasoning is the very basis of most moral judgment.\(^{178}\) The claim that decision-


\(^{173}\) Endicott, above n 171, 317.

\(^{174}\) Urbina, above n 140, 39.

\(^{175}\) Endicott, above n 171, 324.


\(^{177}\) Endicott, above n 171, 324.

\(^{178}\) Urbina, above n 140, 39
making by this method is inherently irrational, and therefore a strike at rule of law, seems in this light unjustifiably extreme.

B. The ‘weak’ incommensurability objection

The second, and more evolved, version of the incommensurability objection concedes that even though competing rights or interests may be incommensurable in some senses, there may nonetheless be rational ways of choosing between them.\footnote{Tsakyrakis, above n 97, 472-3.} For example, if there is an external standard of assessment or a common denominator that is capable of being applied to the situation, then it may be perfectly rational and reasonable to use that standard or denominator to decide between incommensurable interests. Jeremy Waldron has described this as the difference between ‘strong incommensurability’, which leads to ‘paralysis in the face of immiscible values’ and ‘weak incommensurability’ which, by permitting interests to be prioritised against each other, allows them to be compared or ‘brought into relation’ with one another.\footnote{Jeremy Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’ (1993) 45 Hastings Law Journal 813, 816-7.}

A common means of prioritisation is by assigning relative moral or normative value to competing interests. When the relative normative value of an interest vis-à-vis a competing interest is assigned, even if such value is incapable of being quantified with any mathematical precision, the two variables then begin to take on a degree of commensurability. The relative normative value placed on each interest becomes the common denominator between them, giving rational meaning to other considerations such as the degree to which they might be interfered with as a consequence of balancing one way or another. This much is conceded by some of proportionality’s critics, who acknowledge that ‘one might accept the idea of the commensurability of values within the ambit of a moral discourse’.\footnote{Tsakyrakis, above n 97, 474.}

In light of these considerations, the more evolved version of the incommensurability objection frames its criticism in a narrower form. The objection is that a method that attempts to commensurate incommensurable interests through quantification of degrees of realisation, rather than engagement with some form of
normative prioritisation, as the standard by which to choose between those interests is irrational. On this basis, it is contended that Alexy’s theory is flawed because it attempts to do precisely this: it requires that ‘a principle takes precedence over another when it has more at stake than the opposing principle, that is, when it would be satisfied to a greater degree than the opposing principle by a decision in its favour’.\textsuperscript{182} It is asserted that because proportionality ‘pretends to avoid moral reasoning’,\textsuperscript{183} it fails to establish the foundation upon which weak incommensurability might be constructed.

A fundamental problem with this objection is that it oversimplifies and misunderstands Alexy’s theory and, consequently, proportionality analysis. Alexy never contended that the only factor to have a bearing at the final balancing stage would be the degree of ‘realisation’ of each right or interest (or principle) relative to the other, or what has been described as the ‘degree of their relative coexistence’.\textsuperscript{184} The suggestion was never made that proportionality would be entirely ‘objective, neutral and totally extraneous to any moral reasoning’.\textsuperscript{185} Rather, Alexy has always contended that there will be other considerations relevant to the decision taken at the final balancing stage of proportionality, \textit{including} the relative normative weight to be assigned to each right or interest with respect to the other.\textsuperscript{186}

The centrality of normative or moral reasoning to the final balancing stage of proportionality analysis under Alexy’s theory can be demonstrated via the consideration of a simple hypothetical scenario: a challenge to a law that prohibits political protests on certain footpaths to permit the passage of pedestrians. For the sake of this example, it might be assumed that there is general agreement that there

\textsuperscript{182} Urbina, above n 140, 55.
\textsuperscript{183} Tsakyrakis, above n 97, 474.
\textsuperscript{184} Ibid.
\textsuperscript{185} Ibid. Cf Jud Mathews and Alec Stone Sweet, ‘All things in proportion? American rights review and the problem of balancing’ (2011) 60 Emory Law Journal 798, 810: [Proportionality analysis, PA] does not tell judges what weight to give constitutional values that are in tension. At best, when used properly, PA guides or constrains how judges balance once they have a sense of how the contending values are to be weighed. Put differently, balancing will always require some background notions or theories of the nature and scope of rights, the proper role of the state in the society, economy, or private life, and so on’.
\textsuperscript{186} Alexy, \textit{Theory}, above n 70, 102-5, 406. Alexy makes repeated references to the balancing exercise not being ‘valueless’ but as requiring an engagement with both ‘degrees of infringement and importance’.
is a higher normative value attached to political communication than to keeping footpaths clear of protestors when there are other routes available to pedestrians. If balancing simply involved considering the degree to which each of these interests might be realised, it is highly likely that the law would be validated. This is because a law prohibiting protests on certain footpaths would keep footpaths completely clear for pedestrians, realising that interest completely, while keeping all of the almost infinite channels of political communication open with the exception certain footpath protests.

However, this is not the kind of reasoning that Alexy suggests ought to be undertaken under the final stage of proportionality. Rather, Alexy’s theory – and the Constitutional Court’s practice upon which it is based – suggests that where there is not as much normative value attached to one interest, such as keeping footpaths clear for pedestrians who have other options, and the pursuit of this interest curtails freedom of political communication, which has a much higher normative value attached to it, then it would be entirely appropriate to take these relative normative values into account along with the degree of satisfaction of each of these interests. Accordingly, it would be rational for a court reach the conclusion that the law is invalid even though a pure utilitarian analysis might suggest the opposite result. It is therefore a misunderstanding of Alexy’s theory to maintain that the final stage of proportionality ‘pretends to balance values while avoiding any moral reasoning’.

C. Refinement not rejection

Of course, what must be acknowledged here is that requiring judges to make value judgments of these kinds, whilerationally explicable, may not be capable of being

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187 Indeed, the objection is more accurately made against accounts presented by others who suggest that degrees of interference and satisfaction alone are sufficient to compare incommensurable interests: see, for example, Paul-Erik Veel, ‘Incommensurability, Proportionality, and Rational Legal Decision-Making’ (2010) 4 Law & Ethics of Human Rights 177, 210-3; Virgilio Alfonso Da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31 Oxford Journal of Legal Studies 273, 287, 290-91.

188 Tsakyrakis, above n 97, 474. On this front, Urbina’s argument becomes quite curious and appears to hedge both ways. On the one hand, he concedes that Alexy’s theory has always acknowledged the role of normative value judgment: see Urbina, above n 140, 55, 56-7 (see, in particular, references to ‘Weight Formula’). On the other hand, Urbina insists that balancing suggested by Alexy’s theory at the last stage of proportionality analysis does not engage with weak incommensurability based on normative prioritisation: see Urbina, above n 140, 62. Both contentions cannot be maintained simultaneously.
carried out with mathematical precision.\textsuperscript{189} As Alexy himself has acknowledged, there will be degrees of empirical and normative uncertainty that a court will need to acknowledge and deal with when deciding hard cases.\textsuperscript{190} This uncertainty makes critics of proportionality nervous and sceptical. It encourages them to leap to the conclusion that proportionality is inherently irrational. In response, scholars such as Aharon Barak\textsuperscript{191} and David Beatty\textsuperscript{192} have suggested refinements to proportionality focused not on undermining its underlying conceptual rationale\textsuperscript{193} but instead quelling concerns associated with uncertainty in its application.

David Beatty, for example, has acknowledged that the central concern of most critics of proportionality boils down to their view that balancing ‘lacks legitimacy and violates the principle of separation of powers’ because it requires judges to make value judgments.\textsuperscript{194} Beatty suggests, however, that this assertion is incorrect because ‘[w]hen it is applied properly’,\textsuperscript{195} proportionality encourages judges to make value judgments not from their own perspective but rather from the perspective of those who are affected most by the realisation of or intrusion upon the interests at stake.\textsuperscript{196} In this sense, proportionality offers a neutral means of conducting judicial review, not because it avoids value judgments, but because, in Beatty’s view, it engages with them from viewpoints \textit{other} than those of the judges deciding a case.\textsuperscript{197} Normative uncertainty is in this way dealt with by farming out that uncertainty to those who care the most about the result of a balancing process. Of course, the obvious hurdle which Beatty’s approach fails to overcome is that it assumes that judges are capable of making value judgments from a standpoint other than their own.

\textsuperscript{189} As observed by Alison Young, ‘a precise scale of measurement against which to weigh competing interests is not required for the court to provide objective assessments of the relative interests’: Young, above n 88, 57.

\textsuperscript{190} Alexy, \textit{Theory}, above n 70, 418. See also, Matthias Klatt and Moritz Meister, \textit{The Constitutional Structure of Proportionality} (Oxford University Press, 2012) 11. Factual and normative uncertainty will be discussed further in Chapter 4 of this thesis.

\textsuperscript{191} Barak, above n 67.

\textsuperscript{192} Beatty, above n 136, 159-188.

\textsuperscript{193} Although Urbina attempts to present these as alternatives to Alexy’s theory, ultimately he is forced to characterise them all as ‘maximisation’ accounts of proportionality as they all share fundamental characteristics first proposed by Alexy: see Urbina, above n 140, 17-38.

\textsuperscript{194} Beatty, above n 136, 74.

\textsuperscript{195} Ibid 160.

\textsuperscript{196} Ibid 93-4, 160.

\textsuperscript{197} Ibid 93-4, 161-168.
Aharon Barak, on the other hand, does not labour under any illusion that there is some magical mechanism by which judges might altogether avoid making value judgments of their own.\textsuperscript{198} Barak instead attempts to deal with normative uncertainty in a similar fashion to Alexy, by suggesting that judges might look to the ‘marginal social importance’ of each right or interests in conflict in order to compare them or establish their ‘proper relation’ to each other.\textsuperscript{199} However, in a more nuanced version of Beatty’s approach, Barak suggests that this ‘importance’ might be arrived at through the consideration of factors beyond a judge’s own singular experience. He suggests, for example, that it might be derived from consideration of ‘different political and economic ideologies, from the unique history of each country, from the structure of the political system, and from the different social values’.\textsuperscript{200} Again, however, the objection might be raised that in the circumstances of a particular case, and constrained by what is put before them by the parties to that case, it is doubtful that judges will have all the empirical evidence available to them to be making conclusive normative judgments with a wide lens perspective.

Whatever might be made of the above attempts to reduce uncertainty in judicial decision-making – and, indeed, this thesis makes its own attempt at dealing with this issue in the following chapter – it is possible to accept that the mere presence of uncertainty does not undermine the underlying logic of proportionality as an analytical tool. Another way of putting this is to consider that while it might not be possible to provide a \textit{scientifically defensible} reason for why an apple might be preferable over an orange, a \textit{heuristically compelling} reason for that preference, when articulated with candour, may be sufficient in most cases.\textsuperscript{201}

\begin{footnotes}
\item[198] Beatty himself seems to acknowledge this at points: Ibid 168.
\item[199] Barak, above n 67, 340, 349, 484.
\item[200] Ibid 361.
\item[201] Timothy Endicott offers this example: ‘If we are trying to decide whether to go to a restaurant with excellent food that is expensive, or a restaurant with less-than-excellent food that is cheaper, you would be right to say that there is a common base for comparison (we could call it “preferability”); and you would be right to insist that there \textit{may} be rational ground for judging that one restaurant is preferable to another (because, for example, there can be definite reason to choose a much-less-expensive restaurant where the food is almost as good). But you would have no reason to claim that the considerations that determine which restaurant is preferable are commensurable…’: Endicott, above n 171, 318.
\end{footnotes}
On the other hand, it is highly prudent for courts to acknowledge circumstances in which information or legitimacy deficits have generated uncertainty in the application of structured proportionality. The greater the deficit the further a decision applying the method is likely to move away from the standard of being heuristically compelling, let alone scientifically defensible. While existing theories, like those of Beatty and Barak, suggest that uncertainty may be dealt with by reducing or eliminating it, they do not explain what happens when uncertainty cannot be reduced any further. Thus, in Chapter 4, this thesis explores an alternative approach: one in which structured proportionality itself is refined to respond to greater or lesser degrees of uncertainty in judicial decision-making.

VII. CONCLUSION

According to Robert Alexy’s analysis of German constitutional law, structured proportionality is a useful tool in aid of constitutional adjudication in circumstances where a conflict between two sets of constitutional ‘principles’ (or ‘values’) arises. This conclusion arises once we understand the nature of constitutional principles and, thus, how conflicts between them must be resolved.

One aspect of the nature of a constitutional ‘principle’ is that its existence is justified by a compelling set of reasons for realising it to the fullest extent possible. For example, in a given constitutional system there may be a set of compelling reasons (such as facilitating the ‘marketplace of ideas’ or underpinning information flows necessary for representative democracy) that suggest that the constitutional principle of ‘free speech’ should be realised to the fullest extent possible. On the other hand, another aspect of the nature of a constitutional principle is that it does not command that it must always be realised to the fullest extent possible. Thus, to extend the analogy, it is almost universally recognised that ‘free speech’ does not operate as a rule to automatically trump all other interests that might impede its absolute realisation.

Thus, when a conflict between constitutional principles arises, a balancing of the competing principles is required in order to resolve the conflict. This is because the nature of a constitutional principle is such that it is impossible to tell a priori which principle should be given ascendancy in a conflict between them. The aim of
balancing competing principles is to find a point of optimisation. In a world free of other considerations, such a balance would simply be a 50% compromise between the two principles – a half way point. However, since the world is not free of constraints, the task of finding a point of optimisation is a more complicated exercise.

In the real world, finding the point of optimisation is a weighted exercise. It is constrained by factual and normative realities. Factually, there are constraints like the lack of alternative means to achieve a particular end. Normatively, there are constraints like the greater value we might place on one particular constitutional principle over another. Thus, the real-world point of optimisation represents a balance between the two conflicting constitutional principles that properly reflects the factual and normative constraints that apply to that balancing exercise.

In enacting legislation that pursues a particular end by encroaching on a constitutional right or interest, the legislature selects a particular ‘balance’ between those two interests (whether knowingly or not). The task of judicial review is to supervise whether that selection is constitutional. Structured proportionality is a tool of reasoning that can aid the judiciary in identifying whether the legislature has selected a point of compromise between two competing constitutional principles that is sub-optimal, or unconstitutional, given the factual and normative constraints on that exercise. It is, in this way, a contextually sensitive, evaluative aid to judicial review in the specific context of a conflict between two principles. It functions as follows.

The necessity stage of structured proportionality deals with factual constraints. Thus, it asks whether there are alternative means available (a real-world factual constraint) which could achieve the same end as a law (a constitutional principle) by encroaching less on a conflicting constitutional right or interest (another constitutional principle). If there are alternatives that could achieve the same end with less intrusiveness, then the legislature has chosen a sub-optimal balancing position (because a more optimal position was available) and the validity of the law must be cast into doubt. On the other hand, if there are no available alternatives,
then the legislature has chosen a position that is not sub-optimal,\textsuperscript{202} and therefore the law must be considered valid.

The strict proportionality stage of proportionality deals with normative constraints. Thus, it asks whether the importance (a normative constraint) of a law’s purpose (a constitutional principle) justifies the incursion into a conflicting constitutional right or interest (another constitutional principle). This is a value judgment, made on a heuristic basis. If the answer is no, then the legislature has chosen a position of balance between the two competing principles which is sub-optimal, and therefore constitutionally invalid. If the answer, however, is yes, then the legislature has chosen a position that is not suboptimal and therefore constitutionally valid.

Although Alexy’s theory assists in demonstrating how structured proportionality might aid in the resolution of a conflict between two principles, what it does not adequately answer is how to identify a constitutional problem that comprises a conflict between two principles. Based on the analysis of German constitutional jurisprudence conducted in this chapter, we can now answer that question. A conflict between two principles arises when there is a (i) conflict between two sets of rights or interests; (ii) each of which has the same \textit{prima facie} normative (constitutional) force; (iii) neither of which is absolute; and, (iv) at least one of which is incapable of being defined in the abstract. When these criteria are fulfilled, the constitutional problem that arises (a ‘balancing problem’) conforms to a conflict between two principles. Structured proportionality is therefore a useful analytical tool in the context of a ‘balancing problem’ in constitutional adjudication.

Now that we have an understanding of how, when and why structured proportionality operates as an analytical tool, the next question is whether it is just an analytical tool, or whether it has embedded within it institutional assumptions which condition its response to a ‘balancing problem’. To that end, the next chapter will examine the dominant legal traditions that shaped German constitutionalism during the era in which structured proportionality emerged and the way that

\textsuperscript{202} It might still be sub-optimal in the sense that it has not realised the constitutional principle embodied within the law to the fullest extent possible, but that is not relevant to the question of validity.
institutional views within those traditions influenced the development of the method.
CHAPTER 4.

STRUCTURED PROPORTIONALITY AND JUDICIAL
RESTRAINT

I. INTRODUCTION

The previous chapter considered the close relationship between structured proportionality and a particular type of balancing problem: the balancing of principles. In doing so, it was observed that structured proportionality requires judicial choices to be made in determining the point of optimization of competing principles, which in turn designates the line between constitutional validity and invalidity. These choices are both factual and normative. Factually, under the necessity test, courts are required to determine whether an alternative means achieves the desired end to the same extent as the means (or law) in question, and, if so, whether it does so in a manner that is less restrictive of the competing right or interest. Normatively, at the strict balancing stage, courts are required to consider whether the balance (or level of intrusion on one versus the realisation of the other) struck between the competing interests reflects the underlying normative value that ought to be assigned to each interest relative to the other. In order to give effect to structured proportionality, courts are thus required to make difficult choices reflecting factual and normative considerations inherent in the balancing exercise.

It is understandable, against this background, that concerns might be raised in relation to whether courts are the most appropriate institutions to be making these kinds of factual and normative choices. The concerns are often framed as critiques of proportionality. The charge is that the method invites the judiciary to exceed its institutional role, both in terms of its legitimacy and its competency. As discussed in Chapter 1, much of the Australian critique and resistance towards proportionality – whether structured or not – takes this form. For example, in Leask v
Commonwealth, 1 Dawson J expressed the view that proportionality relies on ‘essentially political rather than judicial considerations’. 2 In the same case, Toohey J considered that a wide application of proportionality in Australian constitutional jurisprudence would draw the High Court ‘inexorably into areas of policy and of value judgments’, 3 with the implication being that this would be an inappropriate development. These concerns are not unique to Australia. Influential international commentators have also noted that, for an adequate implementation of structured proportionality, a ‘doctrine of judicial restraint and deference is necessary if courts are not to take over the functions of other branches of government’. 4 On the other hand, many of these same commentators have observed that such a doctrine cannot go too far, for this may result in the abdication of judicial responsibility. 5 The latter concern is particularly acute in the area of constitutional, as opposed to administrative, judicial review.

In this chapter, these themes will be explored further. The first substantive part, Section II, examines the constitutional culture from which structured proportionality emerged, and considers, specifically, the relationship that this method exhibits with notions of the judicial role in that context. It explores and critiques the apparent assumption that structured proportionality evolved in a context permissive of high levels of judicial discretion and therefore that it is an inappropriate transplant into more restrained contexts. Section III then considers whether structured proportionality can be further developed to enhance its capacity to respond to varying needs for judicial restraint and discretion. It explores whether it is possible to couple structured proportionality with an appropriate theory of judicial restraint, and thus address many of the concerns regarding the method’s relationship with the scope of judicial power.

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3 Ibid 616 (Toohey J).
5 Ibid.
II. JUDICIAL RESTRAINT AND THE ORIGINS OF STRUCTURED
PROPORTIONALITY

A. The relationship between legislative and judicial balancing

When considered at the highest level of abstraction, the notion of balancing competing interests is a meta-problem that is inherent to the process of making law itself. As Roscoe Pound has observed, ‘[t]he law is an attempt to satisfy, to reconcile, to harmonize, to adjust…overlapping and often conflicting claims and demands’. Similarly, it has been noted by various courts that ‘[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.’ Legislative or policy balancing in the absence of constitutional constraints involves a consideration of the competing interests at stake in a policy position from an even-handed starting position. In the process of balancing these competing interests, the legislature ordinarily assigns a normative value to each consideration and heuristically ‘weighs’ them against each other based on costs and benefits, or advantages and disadvantages, or a general sense of the ‘common good’. Frederick Schauer describes this as ‘non-rights-based interest balancing’. A similar concept is captured by Joseph Raz, who considers these to be ‘first-order conflicts’ which are usually resolved intuitively, in accordance with an assessment of the ‘relative strength or weight of the conflicting reasons and determining what ought to be done on the balance of reasons’.

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10 Ekins, above n 6, 345.
11 Schauer, above n 9, 178.
12 Joseph Raz, Practical Reason and Norms (Oxford University Press, 1999) 46.
13 Ibid 36.
If left unchecked, the open-ended nature of this kind of balancing, and thus its heavy contingency on the personal experiences, values, morals and views of the individuals vested with the power to draw the balance, is likely to favour the elite classes from which decision-makers are drawn, or otherwise be skewed by the distorting forces of populism, special interests, information gaps, expediency and opportunism. Liberal democratic systems have long been aware of such weaknesses and have built in structural features as counterweights. Procedurally, there is usually a requirement that legislative decision-making bodies be democratically representative and accountable, with flow-on implications for the mode, manner and timing of elections and eligibility to stand for election.¹⁴ There are also often significant barriers to power coalescing in the hands of a few, usually in the form of regulation of the geographic and demographic representativeness of legislative bodies, as well as the division of legislative power between different polities within the same nation-state. Similarly, legislatures are vested with deliberative mechanisms and processes which are designed to encourage the accumulation of plural viewpoints and the active contest and resolution of disagreements between them. These features collectively account for the ‘institutional competence’ and ‘democratic legitimacy’ of legislative institutions over other (often appointed) arms of government, like the judiciary.

Most constitutional systems do not rely solely on procedural mechanisms as a check on power in this context. Substantive constitutional constraints are also directly applied on the decision-making power itself. Typically, these take the form of express or implied limitations on the exercise of legislative power, or the constitutional recognition of rights or interests (individual or structural) the expression of which may conflict with exercises of legislative power. The effect of these constraints is to shift the legislature’s task from one of balancing from an even-handed starting position to one where that position must be weighted to take into account constitutional constraints.¹⁵ According to Joseph Raz, the balancing process is thus modified by the introduction of ‘second order considerations’.¹⁶

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¹⁵ Schauer, above n 9, 178.
¹⁶ Raz, above n 12, 36–42. See also, Schauer, above n 9, 178.
In exercising its supervisory function, the judicial task is to determine whether the legislature has properly re-weighted the primary considerations (that is, the pure policy considerations before the application of constraints) by reference to the secondary considerations (the constitutional constraints). In that sense, the courts are required to ‘check’ the legislature’s balancing. One means by which such a function can be carried out, as we have seen in Chapter 3, is through the judiciary striking its own balance by deploying analytical tools like structured proportionality. The concern is raised, however, that in conducting such a balancing exercise judges are required to ‘behave as legislators do’. It is a concern that has considerable normative force if we accept that legislatures, through their institutional design and function, generally possess greater institutional competency and democratic legitimacy to conduct such a balance. If the final say is left to the judiciary, what are the safeguards against tyranny and abuse?

On this basis, it is often assumed that structured proportionality can only be legitimately employed in jurisdictions where there is less scepticism towards judicial authority and commensurately less concern regarding apex courts conducting a potentially value-laden balancing exercise with almost complete finality. Resistance to the transplant of proportionality is justified by a notion of cultural difference in the understanding of the proper judicial role. It is suggested, for example, that the use of structured proportionality ‘might be all well and good in a constitutional system in which a function of the judiciary is understood to be the enhancement of political outcomes in order to achieve some notion of Pareto-optimality’, but that this is ‘not our system’.

However, as we shall see in the following section, structured proportionality emerged in a jurisdiction and at a time when there was active contestation between

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19 This kind of concern is not completely unknown in Germany, although it is a minority view: see, for example, Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 University of Toronto Law Journal 383, 395 fn 45, referring to the work of Bernhard Schlink.
those who saw the judiciary’s function in broad, transformative terms and those who preferred a more restrained approach. Indeed, in many ways, structured proportionality is a function of a compromise between these competing forces and its design reflects both a desire to enhance judicial accountability while at the same time avoiding judicial abdication of the constitutional responsibility to conduct review. When viewed in this light, attempts to cast structured proportionality as a method to be associated only with constitutional systems that consider the judicial role in transformative or even activist terms might be seen as overly simplistic.

B. Judicial restraint in post-war Germany

Like all cultures, constitutional cultures are forged from the complex interplay of multiple value sets and the relative power of various institutions and individuals through which these are expressed over time. Identifying a single cultural identity may therefore prove to be an elusive, if not illusory, exercise. 21 Unsurprisingly, then, there is no single account of the constitutional culture in which structured proportionality emerged in post-war Germany. Even if focus is sharpened on the single strand of German constitutional culture relevant to the present discussion – conceptions of the appropriate judicial role in supervisory judicial review – we find that there were competing and contested ideas.

i. The transformative view of the judicial role

On one view, the apex German Federal Constitutional Court (the ‘Constitutional Court’) ought to display little reticence about exercising a function which does not seek to delineate strictly between legislative and judicial roles. Under this account, the work of the courts should not be confined to policing constraints on exercises of power, but instead considered an ‘aid to all of the organs of the state in their task

21 While it may appear to internal actors that a particular culture exhibits certain distinct features, a different and external viewpoint may yield an entirely different, but equally valid, conclusion. These observations have two implications for the following section. First, an attempt is not made to capture all the nuances and complexities of the rich legal history of Germany or the full variety of its competing traditions, customs, mores, beliefs and philosophies. Rather, the aim, born out of the context of this work, is extremely modest. It is to illustrate to the reader that these complexities do indeed exist, and that one particular dichotomy has had a central influence on structured proportionality as it has emerged out of and continues to be applied in that jurisdiction. Second, the observations made in this regard must be taken in light of the knowledge that they have been viewed through the lens of a common lawyer educated and socialised in that tradition. Mindful of this limitation, any claims herein should be read as made with the intention of being relative rather than absolute ones.
of optimizing rights and other countervailing principles properly’. The foundations of this conception of the role of the Constitutional Court are rooted in the traumatic events of recent history and certain institutional design features that were subsequently incorporated into German constitutionalism.

German constitutional review predated the ratification of the Basic Law in 1949. Indeed, it is suggested that an ‘embryonic’ version of constitutional review first appeared in 1495 with the establishment of the Reichskammergericht (Court of the Imperial Chamber) to resolve disputes between competing principalities within the Holy Roman Empire. In its more modern form, constitutional review emerged under the monarchical constitutions of the 19th century. This review was not undertaken by a separate court but rather a chamber of parliament. By the time of the Weimar Republic, however, constitutional review was being conducted by the Staatsgerichtshof, a part-time tribunal independent of other institutions of government. Its responsibilities included the adjudication of impeachment trials and the settlement of federal-state and state-state disputes. Although a catalogue of individual rights had been included in the Weimar Constitution, these were considered broadly non-justiciable, and the Staatsgerichtshof’s role was mostly limited to deciding on structural matters.

However, the failures of the Weimar Republic and the eventual horrors of the Nazi regime which it precipitated meant that, in the era of post-war reconstruction, a renewed emphasis was placed on rule of law as a protection against arbitrary power. Central to that conception was the notion of a constitutional court with entrenched power and ‘extensive authority’ to administer the rule of law and fortify against the return of tyranny. To that end, the existence and function of the Constitutional Court was entrenched within the new German constitution. It was designed so that

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22 Sweet and Mathews, above n 18, 94 (emphasis omitted).
24 Ibid 5.
25 Ibid.
26 Michaela Hailbronner, Traditions and Transformations: The Rise of German Constitutionalism (Oxford University Press, 2015) 47. Hailbronner notes that some tentative steps were taken by the Staatsgerichtshof towards adjudicating upon ‘traditional liberal rights’ as opposed to socio-economic rights.
27 Ibid 2.
judges would be not be appointed by the executive but elected in equal measure by the *Bundestag*, the federal legislature, and the *Bundesrat*, which is made up of members of the State executive governments, respectively.\textsuperscript{28} It was empowered to strike down even democratically enacted legislation and consider matters referred to it by the federal government, a state government or at least one third of the members of federal Parliament in circumstances where the referring body has doubts regarding the compatibility of federal or state law with the Basic Law. This procedure, known as ‘abstract norm control’, has been said to place the Constitutional Court close to the ‘center of political action’.\textsuperscript{29} In addition, it was charged with hearing individual complaints brought on the basis of alleged violations of a new set of constitutional rights to be found front and centre of the Basic Law. To that end, it was seen as playing a central role in bringing about ‘a profound transformation of German consciousness and attitudes so that the values upon which human rights are founded would become acknowledged and internalised in German society’.\textsuperscript{30}

In many ways, the workings of the Constitutional Court reflect the broad vision for it just described. Indeed, one of its first significant flexes of power was to declare that the Basic Law was organised around a hierarchy of norms at the centre of which sat the value of ‘human dignity’.\textsuperscript{31} This significant turn in German jurisprudence, alongside declarations that constitutional adjudication could arise in purely private matters,\textsuperscript{32} opened the Constitutional Court’s jurisprudence to a wider scope than would be recognisable with respect to many other constitutional or apex courts around the world. The Court also appears to be comfortable with significant inter-institutional comity, where the individual ‘organs’ of government are seen as playing a complementary, and sometimes overlapping, role towards the same ends. For example, the Constitutional Court actively engages in a kind of dialogue with the legislature by sometimes refraining from invalidating a law immediately.


\textsuperscript{29} Ibid 28.


\textsuperscript{31} Lüth case, Bundesverfassungsgericht [German Constitutional Court], 1 BvR 400/51, 15 January 1958 reported in (1958) 7 BVerfGE 198; Cohen-Eliya and Porat, above n 30, 48-9.

\textsuperscript{32} Grimm, above n 19, 387, 392.
Instead, it provides the legislature with some time to correct its constitutional faults or simply issues a warning that the law may soon become unconstitutional. It displays a tendency to incorporate into its decisions ‘specific instructions to the legislature as to how to assure future compliance with the Basic Law’. Consequently, the judiciary is considered by some ‘an institution with the tools for imposing rationality and reasonableness on other public entities’. In fulfilling this role, the Constitutional Court is generally considered free to balance competing considerations as legislators would.

ii. The ongoing influence of the legal scientific tradition

Nonetheless, it would be a mistake to consider that the post-war period represented a complete break from existing German legal traditions. Indeed, it has been observed that the notion of judicial review incorporated into the Basic Law drew much more heavily on existing domestic notions of constitutionalism than any imposition by the victorious Americans of their own system. In this sense, a competing account of the judicial role in German legal culture emphasises continuity with pre-war traditions in which there was emphasised a marked degree of restraint in the judicial function.

German constitutionalism before the Basic Law was heavily influenced by the legal scientific traditions of continental Europe. ‘Scientific law’ was the label given to what was perceived to be a ‘closed, gapless system’ from which judicial decisions could simply be extrapolated from abstract legal propositions. As Michaela Hailbronner has noted, legal scientific culture emphasised notions such as ‘professionalism, technicality, and de-personalization’. The goal was to make law appear as objective and politically neutral as possible, and capable of being reasoned in a manner analogous to its natural science counterparts. These values

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33 Currie, above n 28, 29.
34 Cohen-Eliya and Porat, above n 30, 90.
35 Kommers, above n 23, 7.
36 Hailbronner, above n 26, above n 26, 69.
38 Hailbronner, above n 26, 70.
39 Bomhoff, above n 37, 36.
were an integral part of German legal thinking from at least the 19th century, with the 1891 Civil Code ‘based from the outset on a scientific understanding of law’.  

Legal science was operationalised in judicial thought primarily through legal formalism. In 1925, Max Weber famously described this legal scientific version of formalism as encompassing five requirements:

…first, that every concrete legal decision be the ‘application’ of an abstract legal proposition to a concrete ‘fact situation’; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a ‘gapless’ system of legal propositions, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be ‘construed’ legally in rational terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an ‘application’ or ‘execution’ of legal propositions, or as an ‘infringement’ thereof.

Through the work of scholars like Philipp Heck, the approach developed into the influential school of Begriffsjurisprudenz (‘jurisprudence of concepts’), which had as its aim a construction of the law ‘as an internally consistent and logical system of norms and principles that would be able to provide right answers to any potential legal question’. Heck noted that the role of a judge within such a system was to act as an ‘automaton’. Judicial decision-making was not to be swayed by consequentialist concerns regarding what would be ‘just from the point of view of its effects on human affairs’. Although the jurisprudence of concepts was primarily influential on the development of German private law, scholars have also noted its impact upon key public law scholars. And while there appeared to be some opposition by the Freirechtsschule (German Free Law School), which suggested a version of legal realism as an alternative framework, this appeared not to gain much traction.

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40 Hailbronner, above n 26, 72.
41 Bomhoff, above n 37, 36.
43 Hailbronner, above n 26, 72.
45 Ibid.
46 Hailbronner, above n 26, 72; Bomhoff, above n 37, 39.
47 Hailbronner, above n 26, 73.
Against this background, it is unsurprising that in its early years the Constitutional Court repeatedly emphasised that it did not regard ‘review or comment on purely political issues already decided by parliament as part of its duty’ and that it would not comment on the value of parliamentary decisions or replace them with its own. Instead, it placed a ‘continued faith in legal formality’. Statements such as the following by Ernst Freisenhahn, a justice of the Constitutional Court, reiterated that the Court viewed its task as distinct from politics:

As an independent, neutral body, which renders decisions solely in terms of law, it determines the law with binding effect when it is disputed, doubted or under attack. In doing so, it bears no political responsibility, though its decisions may have great political significance.

Scholars have suggested that the explanation for this approach lies in the Constitutional Court’s initial search for institutional legitimacy. When it commenced its function on 28 September 1951, its ‘status within the governmental framework of separated powers, and even its relationship to other high federal courts, remained an unsettled issue’. The Constitutional Court’s adoption of the prevailing legal scientific tradition was, in this context, the most uncontroversial step it could take towards establishing its own authority.

Over time, the Constitutional Court has, indeed, established the legitimacy and authority it lacked as a new institution in the immediate post-war period. As described above, its workings reflect to some degree a broad conception of the role of judicial review. Despite these developments, however, it is not difficult to see that the influence of the German legal science tradition on conceptions of the judicial function is still palpable. For example, in the following passage taken from the Constitutional Court’s own website, we can see that it is still concerned to define its role by distinguishing between ‘legal’ and ‘political’ functions:

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49 Bomhoff, above n 37, 235.
51 Hailbronner, above n 26, 79.
52 Kommers, above n 23, 15.
The work of the Federal Constitutional Court has political effect. This becomes particularly clear when the Court declares a law to be unconstitutional. However, the Court is not a political body. Its sole standard of review is the Basic Law. Questions of political expediency may not be taken into account by the Court. It merely determines the constitutional framework within which politics may develop. The delimitation of state power is a feature of modern democratic constitutionalised states.\footnote{German Federal Constitutional Court, \textit{The Court’s Duties}, No Date, Bundesverfassungsgericht, \url{http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Aufgaben/aufgaben_node.html}.}

\textit{iii. Structured proportionality as a compromise}

Structured proportionality was forged from the interaction between the two competing views of the judicial role just described. The creation of justiciable constitutional rights via the Basic Law introduced a higher degree of indeterminacy into the adjudicative process than had been seen before. However, the German response to this shift was not to embrace overtly political decision-making but rather to try to find legal approaches to reduce the indeterminacy.\footnote{Hailbronner, above \textit{n 26}, 83.} In this context ‘balancing was seen as law, not politics or policy’.\footnote{Bomhoff, above \textit{n 37}, 235.} As Moshe Cohen-Eliya and Iddo Porat have observed, balancing was viewed as ‘the objective, systematic, and logical implementation of constitutional rights.’\footnote{Cohen-Eliya and Porat, above \textit{n 30}, 51.} The method was a tool of adjudication belonging to the school of thought which emphasised rational legality.

Structured proportionality, the staged form of proportionality analysis discussed in the previous two chapters, bears the distinct hallmarks of the influence of the legal scientific tradition. The assessment is deliberately structured ‘in a number of heavily dogmatized ‘steps’’, which reflects the German legal cultural desire for ‘systemization and conceptualisation’.\footnote{Bomhoff, above \textit{n 37}, 220.} Michaela Hailbronner has further observed that structured proportionality creates a degree of consistency in adjudication, allowing the Constitutional Court to maintain the appearance of neutrality when assessing the relative normative value of individual rights against other social interests embodied in legislation.\footnote{Hailbronner, above \textit{n 26}, 117.} On the other hand, the method leaves significant areas of discretion to the Constitutional Court to address contextually in the
circumstances of a concrete case. In that way, the Court is left free to perform its function of ensuring that its jurisprudence is harmonised with the prevailing values of the Basic Law. Hailbronner concludes that proportionality’s design means that it is ‘both flexible and legal enough for German lawyers’.  

III. VARIABLE INTENSITIES OF REVIEW

A. The value of a theory of judicial restraint

It has been suggested in the previous analysis that structured proportionality’s evolution and acceptance within German constitutional law reflects a compromise between judicial discretion and restraint. On one hand, the method follows a rigid, multi-part structure that is an attempt to constrain judicial decision-making and reflect German legal science traditions. On the other hand, structured proportionality maintains a degree of flexibility and discretion within its sub-tests, enabling courts to respond contextually to the balancing problem. It has been described, for this reason, as institutionally neutral. That is, it is not pre-weighted towards deciding in favour of any particular set of rights or interests, be they governmental, societal or individual. Accordingly, it does not have baked into its structure any particular view of judicial restraint or deference. This same prima facie institutional neutrality, however, means that the method is open to being applied in flexible ways and with a greater or lesser degree of intensity.

In light of this variable characteristic, it has been suggested that proportionality needs to be combined with a theory of judicial restraint. Such an approach would

59 Ibid 118.
60 Rivers, Variable Intensity: above n 4, 181.
61 Young, Alison, ‘Proportionality is Dead: Long Live Proportionality!’ in Grant Huscroft, Bradley Miller and Gregoire Webber (eds), Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press, 2014) 43, 51. The concept of ‘neutrality’ has been referred to by others in a slightly different sense. For example, Herbert Weschler described neutrality as judicial criteria ‘framed and tested as an exercise of reason and not merely as an act of willfulness or will’: Herbert Weschler, ‘Toward Neutral Principles of Constitutional Law’ (1959) 73 Harvard Law Review 1. David Beatty has argued that proportionality satisfies this kind of ‘neutrality’ also since it allows for the rational harmonisation of competing constitutional principles. See David Beatty, The Ultimate Rule of Law (Oxford University Press, 2004) 161-168.
62 Rivers, Variable Intensity, above n 4, 203.
reflect the view that courts are not necessarily well suited to resolving all types of disputes, particularly if they raise ‘polycentric’ questions, and require taking into account various interests not directly represented by the parties to a particular case.\(^{64}\) It may be that in those situations other branches of government, including the legislature, possess greater claims to democratic legitimacy or institutional competency in making the difficult factual or normative assessments required to decide between competing interests.\(^{65}\) Indeed, the dangers of courts failing to acknowledge these circumstances and ploughing ahead with deciding cases where it is inappropriate for them to do so is that they are likely to produce unworkable solutions, make guesses, or reformulate problems narrowly to fit within the parameters of adjudicative procedures.\(^{66}\) Thus, by structuring proportionality such that it is ‘sensitive to the proper contribution of other branches of government’,\(^{67}\) some of these concerns regarding judicial decision-making under a proportionality method might be addressed.

On the other hand, there are sensitive issues of judicial abdication and subjugation which need to be considered. The fundamental role of constitutional judicial review in demarking limits on power demands that courts do not unwittingly abdicate their function.\(^{68}\) Judicial independence further demands that courts are not subordinated to other institutions of government.\(^{69}\) Thus, while judicial restraint has an important function to play in the application of proportionality, it is equally important to ensure that it does not devolve into a relinquishing of duty. In that sense, there is a relevant distinction to be drawn between respectfully giving weight to the decisions

\(^{64}\) Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 Harvard Law Review 353, 394-404. It is relevant to note that one of Fuller’s solutions to polycentricity in adjudication is to ensure that ‘judicial precedents are liberally interpreted and subject to reformulation and clarification as problems not originally foreseen arise’: at 398. Such an approach mirrors the contextual flexibility offered by structured proportionality.


\(^{66}\) Fuller, above n 64, 401.

\(^{67}\) Rivers, Variable Intensity, above n 4, 176.

\(^{68}\) This view is particularly strong in jurisdictions like Australia. See, for example, Stephen Gageler, ‘Deference’ (2012) 22 Australian Journal of Administrative Law 151, 151; ‘The principle in Marbury v Madison has always been accepted within mainstream constitutional thinking in Australia as justifying the declaration and enforcement by a court of the constitutional limits of legislative power…’.

of other institutions and unquestioningly and submissively deferring to those institutions.\textsuperscript{70}

It could be argued that courts are naturally inclined towards applying proportionality at greater or lesser intensities of review without needing to be explicit about judicial restraint. For example, in Germany, proportionality is applied with varying degrees of intensity depending on the subject matter of the case. In the area of ‘economic politics’, it is assumed that a certain degree of ‘forecasting leeway’ should be left to the legislature.\textsuperscript{71} On the other hand, ‘intensive control of content is adopted when life, individual freedom or other fundamental rights are affected, so long as far-reaching limitations are involved’.\textsuperscript{72} However, an explicit acknowledgment of a theory of restraint would ensure that, in adopting a particular level of scrutiny, courts conduct a thorough assessment of the factors that have contributed to their decision. Express acknowledgment of these reasons would bring clarity to the parts of a judgment that have been influenced by higher order considerations of restraint and, to the extent possible, allow these elements to be distinguished, and scrutinised separately, from the underlying factual and normative judgments being made under the proportionality sub-tests. In this sense, a theory of judicial restraint applied and acknowledged with candour is likely to enhance the transparency of decision-making under structured proportionality.

\textbf{B. Theories of judicial restraint}

Of course, finding a theory of judicial restraint with which to structure the application of proportionality is not a straightforward task. Being one of the most enduring problems in constitutional theory, many approaches to judicial restraint have been suggested over time. Recent literature has helpfully proposed four broad groupings to analyse these approaches systematically: non-doctrinal approaches, formalist approaches, restrictive institutional approaches and contextual


institutional approaches.\textsuperscript{73} It is helpful to adopt this taxonomy to highlight the key considerations which need to be taken into account when attempting to couple structured proportionality with a particular theory of judicial restraint.

\textit{i. Non-doctrinal approaches to judicial restraint}

Non-doctrinal approaches to judicial restraint suggest that no particular guidance or conceptual framework of restraint ought to be constructed and that judges can be trusted to exercise their own judgment as to the appropriate level of judicial restraint on a case-by-case basis. It might be argued that structured proportionality, untethered to any explicit theory of judicial restraint, operates in this way. In the flexibility that it affords judges to decide cases on a contextual basis, it also provides no particular guidance as to how a judge’s discretion might be exercised in the particular circumstances of a case. Jeff King argues that non-doctrinal approaches to restraint are extremely common in the world of judicial decision-making. In deciding real cases, however, it is difficult to conceive that there are not a set of considerations conditioning the decisions of judges as to how to exercise restraint.\textsuperscript{74} And this is the great downfall of non-doctrinal approaches: they make no meaningful attempt to bring to light the considerations which are in fact conditioning an exercise of discretion. Accordingly, in the context of structured proportionality analysis, a non-doctrinal approach to judicial restraint makes it very difficult to discern which aspects of the exercise of a judge’s discretion can be attributed to a normative value judgment and which are more attributable to a particular position adopted as to restraint. Non-doctrinal approaches have in this way an undermining effect on one of the key attributes of structured proportionality: enhanced transparency.

\textit{ii. Formalist approaches to judicial restraint}

Formalist approaches to judicial restraint, just like formalist methods of interpretation, suggest that bright-line rules might be adopted in order to clearly

\textsuperscript{74} King, \textit{Institutional Approaches}, above n 63, 412.
delineate between those areas which are justiciable and those which are not. An example of a formalist approach to judicial restraint is minimalism, suggested by James Bradley Thayer in 1893. Thayer argued that a statute should be upheld as constitutional unless its invalidity is ‘so clear that it is not open to rational question’. Other formalist approaches which have been suggested from time to time include drawing a purported distinction between law (within scope) and politics (outside scope), and principle (within scope) and policy (outside scope).

Formalist approaches to judicial restraint are subject to similar critique levelled at their interpretive counterparts: false claims to objectivity. As is often argued, the appropriate position for the line between in and out categories is frequently contestable. Rather than openly acknowledging that contestability, formalist approaches shield the debate behind seemingly objective rules. This encourages the line between in and out categories to be drawn in ‘an inconsistent and unfair manner’. Thus, as Richard Posner has observed with respect to Thayerian minimalism, ‘you could not explain why a law would ever be declared unconstitutional’. The critique is forceful, however the even more compelling

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75 Adrian Vermeule draws a distinction between what he describes as two ‘senses’ of formalism. Under the first, ‘formalism refers to a type of justification for legal rulings or doctrines, namely a conceptualistic or essentialist justification that excludes considerations of morality and policy’. Under the second, formalism refers to ‘a consequentialist decision-making strategy that courts might follow at the operational level….courts make a second-order decision to decide cases, where possible, according to rules rather than standards, sticking close to the apparent or surface meaning of legal texts and placing great emphasis upon the value of legal certainty and the value of adhering to common understandings of constitutional and statutory commands’: Adrian Vermeule, Judging under Uncertainty: An Institutional Theory of Legal Interpretation (Harvard University Press, 2006) 72-3. It is this second, operational sense of formalism that is discussed herein.


77 Ibid. A form of ‘Thayerism’ has recently been revived by Adrian Vermeule. Speaking of judicial review in the United States, Vermeule has suggested that ‘[c]ourts should enforce the Constitution only where, as the nineteenth-century legal scholar James Bradley Thayer suggested, no reasonable basis for interpretive dispute exists, because the constitutional text is clear and specific. This proposal in effect makes most of the vague, ambitious, and aspirational pronouncements of the Bill of Rights nonjusticiable; it restricts courts to enforcing, for the most part, the more specific structural and coordinating provisions of Articles I-VII of the Constitution’: Vermeule, above n 75, 72-3. For a critique of this rather extreme and deferential notion of formalism in judicial review, see William Eskridge, ‘No Frills Textualism’ (2006) 119 Harvard Law Review 2041, arguing that Vermeule is ‘dismissive of judicial capabilities’ at 2044.

78 See, for example, Ronald Dworkin, Taking Rights Seriously (Harvard University Press, 1978) 22, where he distinguishes between a policy, a ‘kind of standard that sets out a goal to be reached’, and a principle, ‘a standard that is to be observed… because it is a requirement of justice or fairness or some other dimension of morality’.

79 King, Institutional Approaches, above n 63, 414.

80 Ibid 415.

reason we might disregard formalist approaches in this context is that their designation of some matters as wholly within judicial purview and the rest as wholly beyond does not sit well with structured proportionality. In constitutional contexts, structured proportionality is deployed in circumstances where it has already been determined that the exercise of judicial power is necessary: it is a response to the need to resolve the balancing problem. As a consequence, formalist approaches to restraint come at a point in the analysis when their primary contribution—a designation of justiciable issues—is no longer relevant to the inquiry. They are approaches which deny any role for balancing within judicial review.

iii. Restrictive institutional approaches to judicial restraint

Restrictive institutional approaches adopt some of the features of formalist approaches in the sense that they also employ bright-line rules.82 However, instead of using these rules to delineate areas appropriate for judicial decision-making and areas beyond its scope, restrictive institutional approaches use rules to suggest varying degrees of judicial scrutiny in designated contexts. Perhaps the most famous of these kinds of theories is derived from ‘footnote four’ of an otherwise relatively bland case decided by the US Supreme Court in 1938: United States v Carolene Products.83 The relevant sections of the footnote read:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth....

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation...

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religions...or national...or racial minorities...; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to

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82 King, Institutional Approaches, above n 63, 410.
83 (1938) 304 US 144.
curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. 84

The footnote was a suggested solution to the fundamental problem of democratic legitimacy raised ‘whenever nine elderly lawyers invalidate the legislative decisions of a majority of our elected representatives’. 85 The Supreme Court’s resolution was that the judicial role ought to be one which reinforced representative democracy: the courts would heighten their scrutiny of statutes which produced defective legislative processes by distorting the ‘ideal’ operation of representative democracy or prejudicially targeting ‘discrete and insular minorities’. 86 In 1980, John Hart Ely published a highly influential theory which developed the Carolene Products footnote towards a broader theory of judicial review. 87 One of Ely’s key contributions was an exposition of how a court might identify ‘discrete and insular minorities’. Ely ran through a number of options. First, he considered that the concept of ‘discrete and insular’ itself was insufficient to capture the instances in which the court’s scrutiny would need to be heightened, and so he suggested that perhaps the lynchpin might be the identification of ‘unconstitutional official motivations’ for enacting legislation. 88 Acknowledging that it can be difficult to uncover official motivation, 89 Ely suggested that we might instead rely on ‘suspect classifications’, 90 laws which target certain identifiable groups such as racial or religious minorities or aliens. Such an approach, however, had to entail the concession that identification of such groups would require some independent and principled test. After rejecting the utility of immutable characteristics as an identifying test, 91 Ely asserted that perhaps the notion of prejudice or ‘widespread hostility’ against particular groups might be sufficient to serve the purpose, a suggestion that was also made by Justice Stone in footnote four. 92 The existence of such prejudice could be identified by looking to the legislature’s processes to see if

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84 The footnote is reproduced as it was extracted in Ely, above n 14, 75-6.
86 Ibid 714-5
87 Ely, above n 14.
88 Ibid 136 -145.
89 Ibid 145.
90 Ibid.
91 Ibid 150, 154-5.
92 Ibid 152-3.
it contained some systemic bar to access. The lack of access to the legislative process by certain groups was likely to lead to a misapprehension regarding that group within the legislature sufficient to qualify as prejudice. 93 Such an approach would, in Ely’s view, identify minorities ‘barred from the pluralist’s bazaar’ and thus finding themselves ‘on the wrong end of the legislature’s classifications’. 94

Although still a dominant strain in contemporary thought on judicial restraint, Ely’s theory has been subject to countless critiques. 95 These have suggested, variously, the theory fails to capture the full breadth of groups which, despite not being ‘discrete and insular’, are nevertheless subject to prejudice, such as anonymous and diffuse victims of poverty and sexual discrimination, 96 or the disabled and elderly; 97 that the identification of prejudice in legislative processes requires its own substantive value judgments, despite Ely’s theory being aimed at resolving the counter-majoritarian difficulty without courts needing to engage on a substantive level; 98 and that the theory fails to capture other ways in which the legislative process might be distorted, such as through government action that entrenches the position of a majority (or an influential minority) without necessarily resulting in processual prejudice to a ‘discrete and insular’ minority. 99 When we consider these criticisms in the round what we might take from them is not that the representation-reinforcing theory is necessarily wrong, but that it suffers from considerable underinclusiveness with respect to the range of factors or principles that might raise the need for adjustments in the level of judicial scrutiny applied to a given case. Because they ultimately rely on rules and categories like their formalist counterparts, restrictive institutional theories are on their own necessarily

93 Ibid 157.
94 Ibid 152.
96 Ackerman, above n 85, 731.
97 King, Social Rights, above n 73, 180.
98 Ackerman, above n 85, 737; Tribe, above n 95, 1067-1072.
99 Tribe, above n 95, 1077-78. Some scholars have also suggested that Ely’s theory suffers from failing to engage with those who might not be prejudiced by the political process, but might simply have been neglected by it: see, for example, King, Social Rights, above n 73, 182-3. It is, however, difficult to see what role judicial review could play in correcting incidents where there has been a complete failure on the part of the legislature to do something; there is simply nothing to review.
incomplete in their capture of a comprehensive concept of judicial restraint. This may be acceptable to those who think that the ‘net social consequences of employing bright-line rules (even if occasionally arbitrary) may be superior to allowing multi-factoral judicial weighing to take place on a case-by-case basis’.  

It is however, by no means a view that is shared across all legal cultures or even by all stakeholders within the same culture.

Restrictive institutional approaches do not fit neatly with structured proportionality either. These approaches assume a starting point of high deference to the legislature, which is then subsequently dialled down in response to the presence of certain factors. However, structured proportionality does not assume a starting position on the scale of deference and restraint. As we have seen, it adopts a neutral starting position from which deference can either be ratcheted up or dialled down. Structured proportionality thus requires a theory that can respond more contextually to both factors that may suggest the need for increased judicial restraint and factors that may suggest the need for a more interventionist role on the part of the judiciary.

iv. Contextual institutional approaches to judicial restraint

Those who subscribe to contextual institutional theories do not share the concerns of their restrictive counterparts regarding multi-factoral, contextual weighing of considerations by judges on a case-by-case basis. They do not negate the value of restrictive institutional approaches, either, but suggest that there may be considerations unidentified by those approaches which may also be relevant to assessing the appropriate level of restraint in a particular case. As their name suggests, they are highly malleable and responsive to context and, because of this, they are capable of adapting to varying sets of circumstances without succumbing to problems that plague restrictive institutional and formalist approaches, particularly underinclusiveness. They are also distinct from non-doctrinal approaches because they insist that, although there may be a complex matrix of factors affecting an assessment of the appropriate level of judicial restraint in an

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100 King, Institutional Approaches, above n 63, 431.
individual case, these factors are nonetheless capable of being identified and expressly acknowledged.

Many different contextual institutional approaches have been suggested by both academics\(^{101}\) and judges\(^{102}\) from time to time. Each of these puts forward its own version of a matrix of factors that may be relevant to assessing appropriate judicial restraint in a given set of circumstances. There appears, however, to be one central concern common to all of these approaches: that the need for judicial restraint arises in the face of uncertainty.\(^{103}\) Uncertainty can take the form of empirical (factual) uncertainty or normative uncertainty.\(^{104}\) Factual uncertainties may arise, for example, in cases where it is impossible for a court to become cognisant of all the considerations that may be relevant to determining whether there is, in fact, a less restrictive means available which achieves the same purpose as the impugned provision without some collateral, adverse effect, such as increased cost or reduced effectiveness.\(^{105}\) Normative uncertainties, on the other hand, may arise when deciding what value to place on a particular right or interest vis-à-vis another right or interest proves to be a highly contentious exercise over which there is reasonable disagreement.

Differences in their institutional design and function mean that it may be more appropriate for one of the judiciary or the legislature to adopt the lead role in attempting to resolve any uncertainty which has arisen in a particular case. In circumstances where it is more appropriate for the legislature to do so we might expect greater deference on the part of the judiciary as ‘a rational response to uncertainty’.\(^{106}\) Deference does not mean, in this context, a complete abdication of

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\(^{101}\) See, for example, Aileen Kavanagh, ‘Defence or Defiance? The Limits of the judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed), Expounding the Constitution: Essays in Constitutional Theory (Cambridge University Press, 2008) 184; King, Institutional Approaches, above n 63; Henckels, above n 63.


\(^{104}\) Alexy, above n 103, 414.


\(^{106}\) Kavanagh, above n 101, 186.
the judicial supervisory role, undermining the constitutional function of judicial review.\textsuperscript{107} Rather, it is used synonymously with the concept of judicial restraint, in the sense of showing respect for and giving commensurate weight to the judgements of the legislature where appropriate and therefore rational.\textsuperscript{108}

Two broad groupings of factors are commonly suggested as affecting our assessment of whether it is more appropriate for the legislature or the judiciary to deal with uncertainty in a given case: institutional competency and democratic legitimacy.\textsuperscript{109} We might say that in the average case we can assume that a supervising court has some baseline level of competence and legitimacy to decide a case in which the balancing problem arises. We can assume this to be the case because without such competence and legitimacy there would be no notion of judicial review or a supervisory role for courts to play. In the sense relevant to the present discussion, courts gain their institutional competency from their capacity to conduct relatively rigorous fact-finding through the testing of all available and relevant evidence in a specific case. They gain their legitimacy through both the constitutional conferral of power on them to conduct judicial review of legislative action and the tacit and ongoing acquiescence of the people to that situation.

A given case may, however, raise a certain degree of factual and normative uncertainty, reducing the judiciary’s relative institutional competency and legitimacy in the context. Contextual institutional theories assert that when there is a high degree of factual uncertainty, and the court forms the view that the case is

\textsuperscript{107} In Australia, in particular, the kind of deference which transmogrifies into abdication of the constitutional judicial function is frequently denounced. See, for example, \textit{McCloy v New South Wales} (2015) 257 CLR 178, 220 [91] (French CJ, Kiefel, Bell and Keane JJ): ‘Deference to legislative opinion, in sense of unquestioning adoption of the correctness of these choices, does not arise for the courts…it is the constitutional duty of courts to limit legislative inference with the freedom to what is constitutionally and rationally justified…the courts must answer questions as to the extent of those limits for themselves’; Kenneth Hayne, ‘Deference – An Australian Perspective’ (2011) \textit{Public Law} 75, 83: ‘if a task is validly committed to the courts, it is the duty of courts to perform it. Deference is duty absconded.’; Geoffrey Lindell, ‘The Justiciability of Political Questions: Recent Developments’ in HP Lee and George Winterton (eds), \textit{Australian Constitutional Perspectives} (Law Book Company, 1992) 180, 224. In the American context, see, Kathleen Sullivan, ‘The Supreme Court, 1991 Term – Foreward: The Justices of Rules and Standards’ (1992) 106 \textit{Harvard Law Review} 22, 67.

\textsuperscript{108} Kavanagh, above n 101.

\textsuperscript{109} Some theories also suggest ‘expertise’ as a factor for consideration independent of ‘competence’: see, for example, Elliot, above n 105, 272-276. However, this appears to be more relevant in the context of judicial review of administrative action where the executive is said to possess some expertise in an area of policy-making: Rivers, \textit{Variable Intensity}, above n 4, 200. It seems far less relevant in the context of judicial review of legislative action, at least to the extent that it is not already captured by the concept of institutional competence.
one in which the legislature may be a relatively superior institution for dealing with 
that uncertainty, it may be appropriate for the court to show a greater degree of 
deferece to the relative competence of the legislature in the circumstances. 
Similarly, where there is high degree of normative uncertainty in a case, it may be 
more appropriate for the court to defer to the democratic legitimacy of the 
legislature in resolving that uncertainty.

If contextual institutional approaches are to escape the flaws of formalist and 
restrictive institutional approaches, however, determining the relative institutional 
competence and legitimacy of the legislature cannot be a prescriptive or categorical 
exercise. And this is where contextual institutional approaches acknowledge that 
there may be a multitude of relevant factors capable of influencing the 
determination of appropriate restraint, each of which will need to be considered on 
a case-by-case basis. Considerations which may be relevant to determining the 
degree of factual uncertainty and the relative institutional competency of the 
legislature to deal with that uncertainty in a given case may include, for example, 
the nature of the rights or interests in question, the degree of polycentricity involved 
in designing means to meet particular ends, the confidence that can be placed in the 
court’s fact-finding and evidentiary procedures, and the extent of the assistance 
provided by the parties in the case. Normative uncertainty may arise, for example, 
upon consideration of the nature of the rights or interests in conflict, the degree of 
incommensurability between those rights and interests, the broader social and 
political environment within which the decision is being made and potential adverse 
impacts in areas not directly under consideration, and the level of reasonable 
disagreement amongst members of the court itself.

These are not, by any means, closed lists. Complicating matters further, the 
assessment of appropriate restraint will not be a one-way street tending always 
towards greater deference. There may be circumstances in which it is more 
appropriate to reduce deference. So, for example, if there is evidence that an 
impugned law is targeting a vulnerable group or a group that has been excluded 
from participating in the political process, then courts may decide that deference is 
not appropriate, in line with Ely’s representation-reinforcing theory. In such cases, 
the assumption that the legislature possesses relatively greater democratic
legitimacy to deal with normative uncertainty would be undermined to the extent of the failures in the system of representation. Similarly, where a court is in a position to appraise specific facts raised by a particular case, including through the participation of expert witnesses and intervenors,\textsuperscript{110} that were not available to the legislature at the time of debating and passing the impugned legislation, it may be more appropriate for courts not to defer for competence reasons. Ultimately, what is critical to the success of contextual institutional approaches is not that definitive checklists be supplied to judges with prescriptions for applying them in some sort of mathematical (and, therefore, practically impossible) way, but that courts are encouraged to reflect on the reasons why more or less judicial restraint may be appropriate in a particular case and to expressly acknowledge those reasons in the course of their judgment.

\textbf{C. Combining a theory of judicial restraint with structured proportionality}

Contextual institutional approaches to judicial restraint operate particularly well within the structure of proportionality analysis. As has been noted, proportionality can, and does, operate at variable intensities of review, and the degree of scrutiny can be varied to accommodate an assessment of the appropriate level of judicial restraint in a given case. Furthermore, because the focus of each proportionality sub-test is different, structured proportionality can accommodate differing determinations of appropriate judicial restraint with respect to factual and normative uncertainties, respectively.\textsuperscript{111}

The assessment of necessity, for example, largely hinges on the \textit{factual} determination of whether the alternatives to an impugned law achieve the same purpose with less restrictive effect.\textsuperscript{112} Thus, the intensity of that test can be varied in response to factual uncertainty.\textsuperscript{113} In circumstances where greater deference is

\textsuperscript{110} Elliot, above n 105, 274.
\textsuperscript{111} Rivers, \textit{Variable Intensity}, above n 4, 199-201.
\textsuperscript{112} Elliot, above n 105, 270; Alexy, above n 103, 394-414.
\textsuperscript{113} Mark Elliot argues that the necessity test can also be varied in circumstances of normative uncertainty. For example, where an alternative law achieves the same purpose with less restrictive effect on the protected right or interest but has some adverse impact on other interests, such as financial, administrative and environmental, courts sometimes apply the necessity test at a more deferential level of scrutiny. However, as Elliot goes on to observe, these collateral effects are more effectively taken into account at the qualitative stage of assessment that is strict proportionality. Here, the courts can take a wide view of the legislature’s purpose or objective and acknowledge that there may have been multiple purposes/objectives (e.g. cost-effectiveness,
appropriate in a given case on factual grounds, a court may decide to apply the necessity stage by confirming validity when the impugned law is one of a range of alternatives each of which achieves roughly the same purpose with broadly the same impact on a competing right or interest. In circumstances where less deference is appropriate, on the other hand, a court may apply the necessity test by validating a law only in circumstances where it has been shown that no alternative means can achieve the same purpose with less restrictive effect on the competing interest.

Similarly, the assessment of strict proportionality hinges on normative determinations of what value to assign to each competing right or interest relative to the other. In response to normative uncertainty, the test can be applied by asking whether the legislature has satisfied a test of ‘reasonable proportionality’. That is, is the importance of the purpose being pursued by the law roughly equal to the degree of incursion into and value of the competing interest? The application of such a test, in practice, would defer to the judgment of the legislature within a margin of acceptable discretion. In most cases it would lead to the validation of a law, except in circumstances where there can be no finding of reasonable proportionality because the importance of the purpose pursued by the law is so far outweighed by the degree of the incursion into and value of the protected right or interest. By contrast, where there is less normative uncertainty, a court might require that the importance of the law’s purpose clearly and unequivocally outweigh the value of and degree of incursion into the competing interest, demanding what has been described as ‘strict proportionality’.

Finally, it might be observed that the suitability stage of proportionality analysis is not particularly suited to being applied at variable intensities of review. This is because asking whether a law has a rational connection to the purpose it is seeking to achieve is essentially a question of rationality, and is not contingent on factual or

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efficiency, environmental protection) each of which when considered collectively with the main purpose must outweigh the degree of incursion into and value of the protected right. See, Elliot, above n 105, 277-280.

114 Elliot, above n 105, 283.

115 Ibid.
normative considerations. Thus, no question of deference would normally arise at this stage.\textsuperscript{116}

**IV. CONCLUSION**

Structured proportionality represents a compromise between two competing legal traditions which each hold a distinct view of the judicial function. Transformative constitutionalists see the judicial role in broad, transformative terms unconstrained by traditional claims to the need for judicial restraint. This tradition views the function of judicial review as central to achieving the broad goals of a value-based society. According to transformative constitutionalists, the courts may need to make value judgments in order to achieve the ideal vision of a harmonised set of constitutional norms. On the other hand, the legal scientific tradition conceives of the judicial function in much more restrained terms. It is a continuance of the formalist traditions of the 19\textsuperscript{th} century which sought to cast law in scientific terms as a closed system of rules by which answers to legal questions could be reached without resort to value judgments. In pursuit of that goal, the legal scientific tradition emphasised the need for structure, rationality and clarity of reasoning.

Structured proportionality emerged in German constitutional jurisprudence at a time when both traditions were competing for influence. In the post-war era, transformative constitutionalists were recasting the judicial function to fit with their vision of a renewed and revitalised German state. On the other hand, those preferring the legal scientific approach emphasised the importance of maintaining stability and continuity with existing traditions and approaches. As a consequence, structured proportionality reflects both of these traditions. Its design incorporates the values of structure, transparency and predictability in the judicial resolution of constitutional problems. It has a certain degree of rigidity to its structure, and its tests proceed orderly from the most legalistic to the least legalistic form of analysis. At the same time, the design of structured proportionality reflects an acceptance that judges do – in some circumstances – need to make value judgments in order to decide cases. Sufficient room is left for this kind of discretion to be exercised, and

\textsuperscript{116} Rivers, Variable Intensity, above n 4,198.
the process is encouraged to be conducted openly and in a manner that contextually responds to the circumstances of a particular case.

These features of structured proportionality mean that, as an analytical tool, it is neutral towards institutional roles within a given constitutional system. Indeed, this neutrality means that it is capable of being applied at intensities of review that respond to specific institutional considerations. For this same reason, however, the contextual application of structured proportionality needs to be combined with a robust theory of judicial restraint. Such an approach would ensure that courts are encouraged to reflect on the intensity of review they are applying in a particular case and make the reasons for their approach expressly known and open to scrutiny. It would also ensure that decisions pertaining to the intensity of review to be applied in a particular case are distinguishable from the underlying value judgments that are being made in the course of applying structured proportionality. Such an approach will enhance the transparency, and therefore legitimacy, of the method.

There are a number of theories of judicial restraint which could be used to condition the application of structured proportionality, including non-doctrinal, formalist and restrictive institutional approaches. However, these theories generally have significant deficiencies, such as encouraging reasoning to be obfuscated or promoting underinclusiveness in the range of factors which might have a bearing on the appropriate level of judicial restraint in a given case.

Contextual institutional theories of judicial restraint, on the other hand, address these deficiencies by acknowledging that there may be a non-exhaustive range of factors any combination of which may be relevant to deciding the appropriate level of restraint in a particular case. They do not leave the exercise to completely ad hoc decision-making, either, but provide general guidance by pointing out the central relevance of factual or normative uncertainty to the process. The greater the degree of factual or normative uncertainty, the greater the case for deference to the judgment of another institution which has greater empirical competency or democratic legitimacy to address the factual or normative uncertainty, respectively. In the circumstances of judicial review of legislative action, that institution is likely to be the legislature. And deference would be accommodated by undertaking judicial review at a lower level of intensity.
The stages of structured proportionality are capable of accommodating contextual institutional theories of judicial restraint relatively neatly. The necessity stage, which deals with factual considerations, can be used to accommodate greater factual uncertainty by being applied at a lower level of intensity when such uncertainty arises (or the opposite if there is less factual uncertainty). Similarly, the strict proportionality stage can be used to allay concerns regarding normative uncertainty by being applied at a lower level of intensity. In this way, combined with a robust theory of judicial restraint embraced with candour and transparency, structured proportionality can be used to respond contextually to the need for greater or lesser judicial restraint in a particular case.
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ALTERNATIVES TO STRUCTURED PROPORTIONALITY

I. INTRODUCTION

It has been suggested so far in this thesis that structured proportionality is an analytical tool which is well suited to addressing a type of ‘balancing problem’ which has certain identifiable characteristics, and which arises from time to time in constitutional adjudication.¹ It has also been argued that structured proportionality is a method, when coupled with a robust contextual theory of judicial restraint, that is capable of responding flexibility to the institutional capacity and legitimacy of the courts to carry out judicial review in a given set of circumstances.² On the other hand, it has been conceded that the application of structured proportionality – particularly if the final strict balancing stage is reached – involves engaging in an unavoidable heuristic exercise of making a value judgment, albeit in contextually responsive manner.³

The aim of the chapter is to test the hypothesis that structured proportionality is not just an appropriate tool of constitutional adjudication in certain circumstances, but indeed the best method of the known alternatives. In pursuit of this aim, this chapter explores alternative methods to structured proportionality which have developed in response to similar kinds of ‘balancing problems’ and to considerations relating the appropriate role of the judicial branch of government in constitutional adjudication. It considers whether these methods are viable alternatives to structured

¹ See Chapter 3.
² See Chapter 4.
³ See Chapter 3.
proportionality by exploring their capacity to aid judicial review in a manner that is sensitive to the judicial role and, perhaps, by avoiding the need for value judgments to be made.

The United States is a jurisdiction which has historically displayed a high degree of scepticism towards proportionality, and therefore offers fertile ground for an exploration of methodological alternatives. With the exception of some individual dissenting judgments authored by Justice Breyer, structured proportionality has not been adopted within US Supreme Court jurisprudence. Indeed, American ‘exceptionalism’ extends so far in this direction that it is widely considered an anathema for foreign constitutional cases to be cited in American federal court judgments. Relatively speaking, this phenomenon has shielded American jurisprudence from the influence of developments in comparative jurisdictions and made it a laboratory for original experimentation.

In this chapter, the focus of analysis is on American Supreme Court jurisprudence that has developed in response to the US Constitution’s First Amendment protections of free speech. This area has been selected as a focal point for several reasons. First, as will be considered in greater detail in the following section, the First Amendment context displays the hallmark characteristics of the ‘balancing problem’ identified in Chapter 3, making the judicial methods which have emerged in this area suitable for direct comparison with structured proportionality. Second, in this context, three identifiable and distinct methods have emerged over time:

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5. For example, District of Columbia v Heller (2008) 554 US 570, 689-690.

6. Aharon Barak, Proportionality: Constitutional Rights and Their Limitations (Cambridge University Press, 2012), 206-7. Cf David Beatty, who has claimed that proportionality is ‘as American as apple pie’: The Ultimate Rule of Law (Cambridge University Press, 2004) 187. Similar claims are made by others, including Vicki Jackson, ‘Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality”’, Rights and Federalism (1999) 1 University of Pennsylvania Journal of Constitutional Law 583, 609-10; Moshe Cohen-Eliya and Iddo Porat, Proportionality and Constitutional Culture (Cambridge University Press, 2013) 17-23; Richard Fallon, ‘Strict Judicial Scrutiny’ (2007) 54 University of California Los Angeles Law Review 1267, 1330-3. However, it is important to note that the argument being made by each of these scholars is that there are methodological similarities between structured proportionality and certain aspects of some US approaches, such as the strict scrutiny standard under tiered review based on categorisation. No suggestion is made, however, that the US courts have accepted a migration of structured proportionality as it is known and understood in other jurisdictions into American jurisprudence.


8. Or, as Stephen Gardbaum has described it, ‘a giant Galapagos’: Ibid 393.
formalism, ad hoc balancing and tiered scrutiny based on categorisation. It is therefore a fruitful area for exploring alternatives. Third, recent scholarship has suggested that a key element of one of these methods, the strict scrutiny standard which forms part of tiered scrutiny, first developed in the First Amendment context and that this is the context in which it is most frequently applied. These findings indicate that there may be something intrinsic about this area which has given rise to at least one of the American alternatives to proportionality. Finally, it has been suggested that the claim to methodological exceptionalism in US constitutional law is strongest in the area of First Amendment jurisprudence. As such, a focus on this area is likely to produce the highest yield in a search for viable alternatives to structured proportionality.

This chapter proceeds in four substantive sections. Section II analyses the intrinsic qualities of the First Amendment, and subsequent developments in interpretation, which give rise to the ‘balancing problem’. In the three sections that follow, each of the American methods – formalism, ad hoc balancing and tiered scrutiny based on categorisation – is assessed in turn. In conducting this assessment, particular attention is paid the suitability of these methods to judicial review in the face of a ‘balancing problem’ and also to their capacity to respond contextually to the need for greater or lesser judicial restraint in a given set of circumstances. Consideration is also given to claims that, through the adoption of these methods, value judgments are capable of being avoided in deciding cases in this area.

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9 It had originally been thought that ‘strict scrutiny’ developed as a method in the context of Fourteenth Amendment equal protection cases, such as Skinner v Oklahoma (1942) 316 US 535 and Korematsu v United States (1944) 323 US 214. However, as Stephen Siegel points out, these cases used the terminology ‘strict scrutiny’ in a general, non-specific way. By contrast, it was in a series of cases in the First Amendment context in the late 1950s and early 1960s that strict scrutiny began to be associated with its constituent elements: compelling state interest test and the narrow tailoring test. See, Stephen Siegel, ‘The Origin of the Compelling State Interest Test and Strict Scrutiny’ (2006) 48 American Journal of Legal History 355, 401-7.


11 Gardbaum, above n 7, 422. Cf Frederick Schauer, who claims that although American approaches and proportionality may reflect some genuine underlying differences, these are not real differences but rather ‘reflect little more than different stages in the development of freedom of expression decision-making structures’: Schauer, First Amendment, above n 4, 31.

12 By contrast, it has been said that the use of categories – which many believe to be the most distinct methodological feature of US jurisprudence – is far less prominent in other areas of American constitutional law, such as the Fourteenth Amendment: Gardbaum, above n 7, 422.
II. THE FIRST AMENDMENT AND THE BALANCING PROBLEM

In order to proceed with a sensible analysis, it must first be demonstrated that the methods which have been employed in the context of the First Amendment jurisprudence really are potential alternatives to structured proportionality. In Chapter 3, the key characteristics of the constitutional problem, described as the ‘balancing problem’ which structured proportionality assists in resolving were identified. It was suggested that the ‘balancing problem’ arises where there is: (i) a conflict between two sets of rights or interests; (ii) each of which has the same prima facie constitutional force; (iii) neither of which is absolute; and (iv) at least one of which is not capable of being defined in the abstract. When this framework is applied to the First Amendment context, it is apparent that it conforms to these key characteristics. It does so in the following ways.

First, where there are regulatory incursions into the freedom of speech protected by the First Amendment, there are competing interests embodied within those regulations which each have the same prima facie normative status as the right to free speech. This is largely assumed in American constitutional law by virtue of the operation of First Amendment limitations on federal laws enacted under Article 1, and also via the incorporation doctrine’s extension of First Amendment limitations to state exercises of legislative power through the Fourteenth Amendment. The view that the interests embodied in legislation operate on the same normative ‘plane’ as constitutional rights was summarised by Roscoe Pound:

The Fourteenth Amendment did not set up these or any other individual interests as absolute legal rights. It imposed a standard upon the legislator. It said to him that if he trespassed upon these individual interests he must not do so arbitrarily. His action must have some basis in reason. It is submitted that that basis must be the one upon which the common law has always sought to proceed…namely, a weighing or balancing of the various interests which overlap or come into conflict and a rational reconciling or adjustment…Thus the public policy…is seen to be something at least on no lower plane than the so-called rights. As the latter term refers to individual interests which we feel ought to be secured by law, the former refers to social interests which we feel the law ought to or which in fact the law does secure in delimiting

13 See, for example, *Gitlow v New York* (1925) 268 US 666 applying to the First Amendment the principle first established in *Chicago, Burlington & Quincy Railroad Co. v City of Chicago* (1897) 165 US 226.
individual interests and establishing legal rights. There is a policy in the one case as much as in the other.\textsuperscript{14}

Second, freedom of speech is not considered ‘absolute’ by virtue of being a constitutionally-entrenched ‘right’ in the First Amendment. Statements accepting the non-absolute status of freedom of speech are abundant in US jurisprudence. For example, in \textit{Gitlow v New York}.\textsuperscript{15} Justice Sanford observed:

\begin{quote}
It is a fundamental principle, long established, that freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.\textsuperscript{16}
\end{quote}

During the era of the Warren Court, some objection to a non-absolute approach was raised by Justice Black, a liberal justice who believed in high levels of protection for constitutional rights.\textsuperscript{17} In his dissenting opinion in \textit{Konigsberg v State Bar of California},\textsuperscript{18} for example, Justice Black expressed the view that the First Amendment contained an ‘unequivocal command that there shall be no abridgment of the rights of free speech and assembly’.\textsuperscript{19} Somewhat inconsistently with his professed absolutist position, however, Justice Black nevertheless conceded on occasion that free speech could be curtailed in the face of a sufficiently compelling competing interest.\textsuperscript{20} This has led commentators to conclude that even Justice Black was never as much of an ‘absolutist’ as he made himself out to be.\textsuperscript{21} It has also been observed that, in any event, his approach ‘had little appeal in the wider legal

\textsuperscript{15} (1925) 268 US 652.
\textsuperscript{16} \textit{Gitlow v New York} (1925) 268 US 652, 666.
\textsuperscript{17} See, for example, \textit{Smith v California} (1959) 362 US 147, 157 (Justice Black). See also, Hugo Black, ‘The Bill of Rights’ (1960) 35 New York University Law Review 865; Siegel, above n 9, 371.
\textsuperscript{18} (1961) 366 US 36.
Thus, the general position appears to be as described by Justice Murphy in *Chaplinsky v New Hampshire*, that ‘it is well understood that the right of free speech is not absolute at all times and under all circumstances’.24

Finally, the justification for freedom of speech is drawn from higher order values and the right is therefore incapable of being defined in the abstract. Frederick Schauer, for example, has observed that the text of the US Constitution provides ‘some guidance in locating the boundaries of the [First Amendment], but the guidance is relatively indeterminate’.25 Schauer argues that there is no single ‘essential’ feature of the First Amendment, but rather that it is ‘much more likely a bundle of interrelated principles sharing no common set of necessary and sufficient defining characteristics’.26 This perhaps explains the observation made Thomas Emerson that ‘the Supreme Court has never developed any comprehensive theory of what [the First Amendment] guarantee means and how it should be applied in concrete cases’.27 Or, as Schauer puts it, free speech cases lean towards ‘vagueness’.28

On this basis, it is justifiable to contend that challenges to legislation based on the First Amendment conform to the essential characteristics of a ‘balancing problem’. They involve (i) a conflict between two sets of rights or interests (the First Amendment right to ‘free speech’ and the interest embodied in government regulation); (ii) each of which has the same *prima facie* constitutional force; (iii) neither of which is absolute; and (iv) at least one of which (the right to free speech) is not capable of being defined in the abstract. In light of this, the approaches taken by the US Supreme Court to resolve the ‘balancing problem’ when it arises in the First Amendment context might reasonably be considered alternatives to structured proportionality and are therefore useful comparators.

22 Siegel, above n 9, 375. Indeed, even Ronald Dworkin has conceded that ‘It is commonplace that no political right is absolute and that even free speech has its limits’: Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press (Belknap), 2011) 473.
23 *(1942) 315 US 568.*
26 Ibid 277.
28 Schauer, *Categories*, above n 20, 277
III. FORMALISM

As we have seen in previous chapters, even in the early jurisprudence of the German Federal Constitutional Court, formalism was emphasised as a means by which constitutional adjudication could be carried in a suitably restrained way. Formalism encompasses approaches which seek to categorise considerations as either ‘law’ or ‘politics/policy’, and designate the former justiciable and the latter non-justiciable. 29 It is, therefore, a meta-label for mechanisms which use rules to allocate functions to institutions, most commonly between courts and legislatures. Formalism also includes rule-based methods which seek to define and categorise legal problems such that the outcome to a dispute is determined through these largely ‘rational’ processes rather than engagement with background polycentric considerations. It thus emphasises objectivity and eschews the consideration of values, policies or politics in the construction of a legal answer.30

A. Langdellian legal science

In the United States at the turn of the 19th century, there were two distinct schools of formalism: Langdellian legal science31 and Lochnerism. Bearing distinct similarities with developments taking place in Germany, Langdellian legal science was, in part, a product of the desire of law schools on American university campuses to appear as ‘scientific’ as their departmental counterparts.32 Langdellian legal science was, consequently, said to adhere to the following tenets: ‘(1) law is determinate, and therefore legal conclusions can be arrived at with certainty and are only minimally subject to individual discretion; (2) law is systemized, based on a coherent and limited set of abstract principles; and (3) law is an autonomous sphere of life, distinct from other spheres such as society, politics, and morality’.33 The approach had two consequences for constitutional jurisprudence. On one hand, there was some attempt to encase constitutional adjudication in these principles,

30 Ibid 414.
31 Named after Christopher Columbus Langdell, Dean of Harvard Law School from 1870 to 1895, and a strong proponent of American formalism: Cohen-Eliya and Porat, above n 6, 33.
33 Cohen-Eliya and Porat, above n 6, 33.
using definitions, categories and rules to reach legally scientific answers to constitutional problems. The result was the creation of a high degree of technicality, which, while generally answering the description of being rational, had little direct relevance to the realities of social and political life. On the other hand, some followers of the school dismissed constitutional law as an area, unlike private law, beyond the realm of serious legal scientific rigour.34

Within First Amendment jurisprudence, the influence of legal scientific methods can be readily found in the case law of the early 20th century. In *Masses Publishing Co. v Patten*,35 for example, Judge Learned Hand suggested that freedom of speech cases should be decided via an objective test that declared an absolute area of operation for the right. Judge Hand’s proposed test focused on the nature of the speech: where it suggested to others that laws ought to be violated, then it fell outside the protection of the US Constitution and could be regulated or prohibited by the government. The test made no accommodation for the context in which the speech was uttered, or the wider circumstances of a particular case before the courts. In a similar development, ascribed to the ‘definitional school’ of American legal thought, in cases such as *Chaplinsky v New Hampshire*,36 the Supreme Court decided that certain kinds of speech were categorically beyond the protection of the US Constitution. In that case, Walter Chaplinsky had yelled at a police officer that he was a ‘God damned racketeer’ and ‘a damned Fascist’. The Supreme Court decided that these were ‘insulting or ‘fighting’ words’ which ‘by their very utterance inflict injury or tend to incite an immediate breach of the peace’,37 and therefore outside the scope of free speech protection. In later legal writings, theorists sought to develop the *Chaplinsky* ‘in or out’ categories by developing a theoretical connection between those categories and some underlying theory of the freedom of speech itself.38 They used definitional approaches to outline the precise scope of freedom of speech and thus to declare its absolute operation within that scope. Nonetheless, these theories failed to adequately develop an abstract

34 Ibid 34.
35 [1917] 244 F.535 (S.D.N.Y.).
36 (1942) 315 US 568.
37 *Chaplinsky v New Hampshire* (1942) 315 US 568, 572 (Justice Murphy).
38 See, for example, Emerson, above n 27; Laurent Frantz, ‘The First Amendment in the Balance’ (1963) 71 *Yale Law Journal* 1424.
definition of the constitutional guarantee which properly captured the full theoretical scope of freedom of speech, with Frederick Schauer observing in 1981:

Reductionism, the urge to reduce complex phenomena to overly simplistic formulae, has been a pitfall throughout legal theory, and no less so in relation to the first amendment. The efforts to create one formula that will generate an area of absolute protection have been heroic, but they have failed in one of two ways. Either they have…simplified things to such an extent that the resultant formula has little if any analytical or predictive value, or they have…achieved consistency and workability at the expense of excluding from coverage much that a full theory of freedom of speech ought to include.\(^{39}\)

**B. Lochnerism**

The other strand of formalism which has had a heavy influence on American legal thought is *Lochnerism*. In *Lochner v New York*,\(^ {40}\) a majority of the Supreme Court held unconstitutional a labour law that sought to limit working hours in bakeries. Justice Peckham, writing for the majority, opined that the law contravened the right of contract between employer and employee and was therefore an interference with ‘part of the liberty of the individual protected by the Fourteenth Amendment’.\(^ {41}\) In doing so, the majority extended the operation of the aspect of the Fourteenth Amendment that guaranteed *procedural* due process to *substantively* review and limit legislative activity. The majority opinion was said to fall within the sphere of classical legal thought.\(^ {42}\) In this mode, ‘the Court did not view itself as weighing or accommodating competing public and private interests, but instead as applying boundary-defining techniques that rendered its analysis “an objective, quasi-scientific one”’.\(^ {43}\)

In the post-*Lochner* era,\(^ {44}\) however, American legal realists sharpened their critique of formalism, arguing that ‘legal forms create the space in which judges may rely on their own preferences, while concealing this possibility from public view by

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\(^{39}\) Schauer, *Categories*, above n 20, 275.

\(^{40}\) (1905) 198 US 45.

\(^{41}\) Ibid 53.

\(^{42}\) See, generally, Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 2006, 2nd ed), Chapter 1.

\(^{43}\) Fallon, above n 6, 1285-6.

\(^{44}\) The *Lochner* era is generally considered the years between 1900-1937: Cohen-Eliya and Porat, above n 6, 37.
creating the illusion of logical necessity and mechanical application'. \(^{45}\) In this light, \textit{Lochner} and other early cases that followed its approach were criticised for venturing into ‘across-the-board substantive review of legislative action’ \(^{46}\) behind the fig leaf of formalism and technical doctrine. \(^{47}\) As Sujit Choudhry has put it, ‘the transgression of the judges of the \textit{Lochner} Court was that, under the guise of constitutional interpretation, they did little more than to impose their own policy preferences on democratically elected legislatures.’ \(^{48}\) Under the influence of legal realists and antiformalists, \(^{49}\) there was in this period a noticeable shift in US Supreme Court jurisprudence away from a heavy reliance on legalistic techniques of ‘classical legal thought’ \(^{50}\) towards those that ‘embraced a view of the law as purposeful, as a means to an end’, and one that ‘demanded a particularized, contextual scrutiny of the social interests at stake in a constitutional controversy.’ \(^{51}\)

\textbf{C. The faults of formalism}

We might conclude that formalism’s attempt to use definitional approaches to categorise the scope of an absolute area of protection for freedom of speech has not been particularly successful. The reasons for this can be traced to the ill-fit that this decisional technique displays with the balancing problem. In assuming that it is possible to define in the abstract the complex value set from which freedom of speech draws, the approach often fails to deal with dimensions of the guarantee which only become apparent when raised in the novel circumstances of a concrete case. Further, by focusing on producing a theoretically-consistent area in which


\(^{46}\) Ely, \textit{Distrust}, above n 21, 14.

\(^{47}\) See also Justice Holmes’ dissent in \textit{Lochner v New York} (1905) 198 US 45, 75-6.

\(^{48}\) Choudhry, \textit{Lochner}, above n 45, 7.


\(^{50}\) Described by Thomas Grey in the following terms: ‘the heart of classical legal theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles. When a new case arose to which no existing rule applied, it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles…’: Thomas Grey, ‘Langdell’s Orthodoxy’ (1983) 25 \textit{University of Pittsburg Law Review} 1, 11. See also, Brian Tamanaha, \textit{Law as a Means to an End: Threat to the Rule of Law} (Cambridge University Press, 2006) 15-18.

\(^{51}\) Aleinikoff, above n 49, 958. Also known as ‘instrumentalism’: see, Tamanaha, above n 50, 60-76.
freedom of speech operates absolutely, formalism tends to define the true scope of the area of protection too narrowly.\textsuperscript{52} Frederick Schauer has argued that this kind of extreme reductionism means that the right is no longer capable of upholding the underlying value that it represents.\textsuperscript{53} A similar argument was made by John Hart Ely:

…..we should face the validity of such an ‘absolutist’ approach head-on and recognize that one simply cannot be granted a constitutional right to stand on the steps of an inadequately guarded jail and urge a mob to lynch the prisoner within. To judge from performances elsewhere, Justice Douglas would say that that was “speech brigaded with action” and therefore not protected, while Justice Black would call it “speech plus” or perhaps simply “not speech” and similarly deny it protection. The justices do themselves no credit here, for “answers” like this are simply not responsible. They refuse to display whatever reasoning in fact underlies the denial of protection, and by their transparent lack of principle substantially attenuate whatever hortatory value there was in the pronouncement that speech is always protected.\textsuperscript{54}

It seemed likely, then, that the problems attendant on formalistic approaches to the First Amendment might be capable of being addressed through the use of a method that did not attempt to develop absolute categorical areas of operation, but rather engaged with the factual and normative complexities of a specific case in order to resolve conflicts. An approach such as this would provide sufficient space for the abstract values which underpin specific rights to be concretised in the resolution of that case without committing the courts to rigid rules to be applied in future cases where they may produce unrealistic, counterintuitive, incorrect or socially ignorant outcomes.

\textsuperscript{52} Schauer, \textit{Categories}, above n 20, 270-1: ‘the freedom of speech does not encompass freedom to fix prices, breach contracts, make false warranties, place bets with bookies, threaten, extort, and so on’.

\textsuperscript{53} Ibid 275.

\textsuperscript{54} Ely, \textit{Distrust}, above n 21, 109.
IV. AD HOC BALANCING

A. A contextual approach

The prevailing critique of formalist approaches made way for the emergence in some areas of American constitutional law, including First Amendment jurisprudence, of ad hoc balancing.55 Ironically, ad hoc balancing evolved out of what was, when it was initially proposed, a formalist approach to the First Amendment guarantee: the ‘clear and present danger’ test.56 The test operated as an exclusion to what was otherwise an almost absolute operation of free speech freedoms. Where speech gave rise to an imminent threat to public safety (e.g. an incitement to unlawful action), it was considered properly the subject of criminalisation. By the 1950s, however, the Supreme Court had come to view the clear and present danger test as encompassing an ad hoc balancing approach.57 Under this approach, the outcome of a case turned on a direct examination of the interests in conflict within that case.58 Thus, the test asked whether ‘the gravity of the ‘evil’, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger’.59

It was said that the advantage of ad hoc balancing, at least when compared to Lochner formalism, was that it would compel a judge ‘give a particularized, rational account’ of how decisions were arrived at.60 Ad hoc balancing focused on taking into account background considerations, such as ‘how important is the right, how bad was the infringement, and how good is the government’s reason.’61 The method has been described as ‘seductive’ because it ‘fits our usual conceptions and metaphors of justice, fairness, and reasonableness’ and addresses desires for thoughtful, sensitive dispensation of justice by weighing pros and cons directly.62

55 See, for example, Konigsberg v State Bar of California (1961) 366 US 36, 51 (Justice Harlan).
56 Schenck v United States (1919) 249 US 47; Debs v United States (1919) 249 US 211.
57 American Communication Association v Douds (1950) 339 US 382 (Chief Justice Vinson; Justice Frankfurter, concurring); Dennis v United States (1951) 341 US 494 (Chief Justice Vinson; Justice Frankfurter, concurring).
58 Aleinikoff, above n 49, 945.
62 Aleinikoff, above n 49, 962.
That is, it grants methodological flexibility to deal with a case in a manner that responds best to its context and merits.\textsuperscript{63}

\textbf{B. Extreme deference}

The enhanced flexibility encompassed within ad hoc balancing arguably made it a much more appropriate decisional technique for addressing a balancing problem than formalism. On the other hand, however, it raised considerable concerns for judicial restraint.\textsuperscript{64} The ‘ghosts of \textit{Lochner},’ while encouraging candid judicial methods, also fed ‘distinctively American fears about judging and the role of judges’\textsuperscript{65} A key plank of that culture of restraint was an emphasis on deference to the legislature as the appropriate institution for ‘weighing and measuring competing interests.’\textsuperscript{66} Indeed, in anticipation of the charge that ad hoc balancing would lead judges to act like legislators, some members of the US Supreme Court sought to overtly couple the method with a high degree of deference to legislative choice. For example, in \textit{Dennis v United States},\textsuperscript{67} Justice Frankfurter acknowledged that the competing interests in that case (national security and free speech) were better served ‘by candid and informed weighing’ than by ‘announcing dogmas too inflexible for the non-Euclidian problems to be solved’.\textsuperscript{68} Nonetheless, he then went on to advocate that a strong position of deference to the legislature ought to be taken:

\begin{quote}
But how are the competing interests to be assessed? Since they are not subject to quantitative assessment, the issue necessarily resolves itself to asking, who is to make the
\end{quote}

\textsuperscript{63} King, above n 29, 411.
\textsuperscript{64} Schauer, \textit{Categories}, above n 20, 299.
\textsuperscript{66} Cohen-Eliya and Porat, above n 6, 40, citing Morton Horowitz, ‘The rule of law: an unqualified human good?’ (1977) 86 \textit{Yale Law Journal} 561. Some readers may be confused by Cohen-Eliya and Porat’s claim that ‘balancing’ was the progressive response to \textit{Lochnerism}: at 38-41. In this context, it is likely that they mean by ‘balancing’ a rejection of rights absolutism and an acceptance that constitutional rights ought to be balanced against other social interests when considering legislative validity. Such an interpretation would make sense if one accepts the view that the majority of the Court in \textit{Lochner} considered the absolute nature of the right to ‘liberty’ (in that case interpreted as including contractual liberty) as trumping other social interests embodied in the impugned New York labour law. Nonetheless, others would argue that ‘balancing’ was exactly what the majority was doing in \textit{Lochner}: see, for example, Justice Holmes’ dissent at (1905) 198 US 45, 75-6, and thus that balancing could not possibly be a response to \textit{Lochnerism}.
\textsuperscript{67} (1951) 341 US 494.
\textsuperscript{68} \textit{Dennis v United States} (1951) 341 US 494, 524-5 (Justice Frankfurter, concurring).
adjustment? – who is to balance the relevant factors and interests and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies…Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to Congress.69

This extreme level of deference left many with the general impression that ad hoc balancing was in reality an abdication of the judicial role, and in this sense avoided rather than addressed the problem raised by conflicts under the First Amendment. Some did concede that there was nothing inherent about ad hoc balancing that would necessarily mean that extreme deference had to be incorporated into it, and it might just as easily have been left to operate without being attached to a deferential stance.70 However, others argued that the very operation of ad hoc balancing tended strongly towards deferential outcomes.71 It was a means by which rights were ‘balanced away’ in a manner discordant with the courts’ usual counter-majoritarian institutional function.72

Even if there had not been a strong level of deference expressly acknowledged as operating within the ad hoc balancing approach, the approach would likely still have raised difficulties. There may, for example, have been ‘a set of considerations conditioning restraint’ which had not been ‘set out in full view’.73 In such circumstances, discerning the underlying normative evaluations made by courts from their general position of restraint or deference may not have been a straightforward exercise, muddying attempts to scrutinise decisions. On the other hand, if no deference had been adopted at all, then the usual concerns regarding excessive judicial discretion, accentuated within the US post-Lochner atmosphere, would likely have arisen.

69 Ibid.
70 Schauer, Categories, above n 20, 303.
72 Bomhoff, above n 32, 153.
73 King, above n 29, 412.
V. TIERED REVIEW BASED ON CATEGORISATION

A. Outcome determinism

After waxing and waning in popularity for some years,74 balancing’s run, at least in the truly ad hoc sense, had for the most part come to an end in First Amendment jurisprudence by the end of the era of the Warren Court in the late 1960s.75 During this period, there was increasing recognition that ad hoc balancing and formalist methods of categorisation did not need to be seen as in direct opposition76 but could instead be deployed in a complementary fashion.77 Each could play ‘its own legitimate and indispensable role in protecting expression’78 while curbing any tendency towards excessive judicial discretion or restraint. In accordance with this view, the application of ad hoc balancing gradually became encased ‘within the confines of strict rules and multi-part tests’.79 It evolved into a tiered system of review where different levels of scrutiny would be applied based on the categorisation of the case at hand.80

In the context of the right to free speech, tiered review based on categorisation tends to proceed in two stages. At the first stage, the courts follow a distinctly formalist approach in identifying whether the interest that is said to be infringed is indeed within the scope of the protection afforded by the First Amendment. This first stage is highly definitional, categorical and precedential. It is, as Frederick Schauer has described, an ‘in or out’ process by which it is decided whether the speech which is subject to regulation or prohibition is either protected or not by reference to existing categories of speech.81 Thus, for example, ‘obscene’ speech of a sexually explicit

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75 Indeed, by 2008 it appeared well and truly out of favour. See, for example, Justice Scalia’s scathing criticism of what he described as an ‘interest-balancing inquiry’: District of Columbia v Heller (2008) 554 US 570, 634-5.
76 Schauer, Categories, above n 20, 300.
78 Ibid.
79 Bomhoff, above n 32, 6. See also, Schauer, Categories, above n 20, 265.
80 Fallon, above n 6, 1270, 1274-5.
81 In fact, Schauer distinguishes between what he calls ‘defining in’ and ‘defining out’. The former is a process of deriving the scope of coverage of the First Amendment from its underlying theoretical foundation. The latter involves giving First Amendment protections a broad initial interpretation from which ‘subcategories of noncoverage are carved out’. Although there might
variety has been held to fall outside the protection of the First Amendment, although a clear justification for this has never been provided. By contrast, ‘offensive’ speech is considered to fall within the protection of the First Amendment. In _Cohen v California_, for example, the Supreme Court overturned Mr Cohen’s conviction for wearing a jacket with the words ‘Fuck the Draft’ emblazoned on the basis of his First Amendment right to free speech. Justice Harlan, writing for majority, held that the potential offence caused by that printed speech did not place it within an unprotected category since ‘offence’ would depend on the subject viewpoint of the listener.

At the second stage of analysis, attention turns away from the kind of speech being regulated and towards the kind of regulation being challenged. The standard of judicial review applied in deciding the case is varied depending on the category into which the impugned regulation falls. For example, indirect and content-neutral forms of speech regulation are generally only subject to the standard of ‘rational basis review’. At this level of scrutiny, ‘it is sufficient that the purpose is a legitimate government interest and that the means selected to achieve that interest have a rational basis’. Thus, if a regulatory instrument falls into a category to which this lower standard applies, an outcome of validity is generally the consequence. For this reason, rational basis review has been described as ‘an all but meaningless’ standard of assessment.

On the other hand, content-based regulations in the context of the First Amendment are subject to a higher standard of judicial review, known as strict scrutiny. This is because it is assumed that if a regulation is content-based, the legislature must be motivated by ‘animus toward the ideas contained in the regulated speech’ and the

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82 _Miller v California_ (1973) 413 US 15.
83 Ely, _Distrust_, above n 21, 114.
85 Fallon, above n 6, 1319.
86 Barak likens these two stages to the first two stages of full form structured proportionality: Barak, above 6, 515.
87 Fallon, above n 6, 1288.
regulation is therefore highly likely to constitute ‘an impermissible government intervention in the marketplace of ideas’.

When strict scrutiny is applied, the burden of proof is shifted to the government to provide a ‘compelling justification’ (as contrasted with the lesser standards of ‘legitimate’ or ‘important’) for the restriction and to show that the measure that is the least restrictive of speech has been selected (known as ‘narrow tailoring’ or the ‘least restrictive measures’ test). Of course, this kind of strict scrutiny from the courts is, by its very nature, more likely to lead to the invalidation of legislation.

B. Advantages of tiered scrutiny based on categorisation

Tiered scrutiny based on categorisation is appealing for its apparent simplicity. It has an affinity with the traditional common law approach to judicial decision-making, and particularly with the demands in that approach for judicial methods that ‘select, classify and arrange’ cases. The categories on which tiered scrutiny depends operate in a taxonomic, rule-like fashion with ‘bright-line boundaries’. Justice Scalia once observed that the rule of law is best served by rules, since these provide clear guidance on lawful conduct and can therefore be used by individuals to negotiate their behaviour. Accordingly, it has been suggested that the tiered scrutiny enhances the consistency and predictability of judicial decisions; a quality particularly valued in the United States’ decentralised system of constitutional

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91 Fallon, above n 6, 1273.
92 Gardbaum, above n 7, 417.
93 Siegel, above n 9, 359-60.
94 Fallon, above n 6, 1270. See also, United States v Carolene Products Company (1938) 304 US 144, 152 fn 4.
96 Christopher Columbus Langdell, Selection of Cases on the Law of Contracts (Little Brown & Co., 1871), quoted in Tamanaha, above n 50, 16.
97 Sullivan, above n 61, 59.
adjudication which permits constitutional validity to be decided by a wide network of lower courts as well as its apex court.\textsuperscript{99}

The primary justification put forward in support of tiered scrutiny, however, is that it operates as a mechanism of judicial restraint. The logic is that ‘two-tier review generally decides cases through characterization at the outset’\textsuperscript{100}, thus ‘leaving little if any discretion to a judge in the particular case’.\textsuperscript{101} The relevant rules, or categories, provide for the application of particular tests into which balancing – or weighing of competing interests – is already incorporated.\textsuperscript{102} Thus, where strict scrutiny is applied, the result is ‘almost always fatal’ to the challenged regulation, while the outcome of applying rational basis review is ‘rarely so’.\textsuperscript{103} In other words, once a case is categorised, it is said that the outcome has already in effect been determined, giving rise to the famous epithet that strict scrutiny is ‘‘strict’ in theory and fatal in fact’.\textsuperscript{104} A court’s task then becomes a legalistic one of diagnosing into which category the case before it ought to fall, rather than conducting a contextualised balancing of the competing interests.

\textit{C. A problematic approach}

Tiered scrutiny based on categorisation has been said to constrain the limits of judicial discretion by offering the courts a choice between only two discrete tiers of review, each of which is said to be close to ‘outcome determinative’.\textsuperscript{105} By essentially eliminating the need for contextual balancing, the approach is thus as part of the attempt to address post-\textit{Lochner} fears of judicial excess and activism.\textsuperscript{106} However, despite the appeal of these claims in theory, recent literature examining

\textsuperscript{99} See Justice Scalia’s ‘list’ of benefits paraphrased by Sullivan, above n 61, 65. See also, Gardbaum, above n 7, 412.
\textsuperscript{100} Sullivan, above n 61, 60.
\textsuperscript{101} Schauer, \textit{Categories}, above n 20, 300.
\textsuperscript{102} Ibid 299.
\textsuperscript{103} Jackson, \textit{Proportionality}, above n 65, 3126. See also, Stone, above n 88, 691.
\textsuperscript{105} Jackson, \textit{Proportionality}, above n 65, 3126. See also, Stone, above n 88, 691. The elimination of the need for contextual balancing also, fortuitously, offered a pathway for resolving the tension between those who were of the view that free speech rights could be balanced against other interests and those, such as Justice Black, who rejected that position. For the latter group, tiered scrutiny meant that they could concede to the balancers that rights might not always operate absolutely while maintaining their aversion to judicial balancing: Siegel, above n 9, 376.
\textsuperscript{106} Jackson, \textit{Proportionality}, above n 65, 3125; Bomhoff, above n 32, 53-56.
the application of tiered scrutiny in practice has begun to challenge the assertion that it is, in fact, capable of operating as an effective vehicle of judicial restraint.\footnote{107}

Much of the difficulty in this area arises out of the categorisation process. To begin, the categories on which tiered scrutiny is based are often unwieldy to apply. They have been described variously as ‘complex and often overlapping’,\footnote{108} ‘decayed and crumbling’,\footnote{109} and as involving considerable ‘inconsistencies’ in application.\footnote{110} There are a myriad of exceptions to the general rules, and it has been observed that the categories ‘have such loose and overlapping boundaries that the dangers of miscategorization are particularly strong’.\footnote{111}

Second, it has been observed that the rigid two-tiered system has been watered down in successive cases. In the First Amendment context, for example, the traditional strict delineation between ‘content-based’ and ‘content-neutral’ categories of regulation (the former being more suspect and attracting strict scrutiny, the latter being subject only to rational basis review) has begun to be replaced by a ‘“sliding scale” of protection based on the perceived value of the speech in question.’\footnote{112} Thus, laws regulating fighting words, child pornography, flag burning, making threats, soliciting bribes, commercial speech and engaging in price fixing all attract different levels of scrutiny from the courts.\footnote{113}

\footnote{107} These criticisms have been echoed in analyses of Canadian jurisprudence relating to the categorical applications of different standards of review within the proportionality test developed in \textit{R v Oakes} [1986] 1 SCR 103. For example, Sujit Choudhry has observed that ‘the dominant narrative of the legacy of \textit{Oakes} is the rise and collapse of simple, dichotomous categorizations meant to help the Court to calibrate the degree of deference according to the particular features of each case’: Sujit, Choudhry, ‘So What is the Real Legacy of \textit{Oakes}? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’ (2005) 34 \textit{Supreme Court Law Review} 501, 520-1. It appears that this categorical approach has now been abandoned in that jurisdiction, with McLachlin J observing in \textit{Thomson Newspapers Co. v Canada (Attorney General)}: ‘nothing…suggests that there is one category of cases in which a lower standard of justification under s. 1 [of the Canadian Charter of Rights] is applied, and another category in which a higher standard is applied’: [1998] 1 SCC 877 [90].

\footnote{108} Stone, above n 88, 688.

\footnote{109} Fallon, above n 6, 1301.

\footnote{110} Ibid 1298.

\footnote{111} Schauer, \textit{Categories}, above n 20, 288.

\footnote{112} Aleinikoff, above n 49, 967, 968.

\footnote{113} Fallon, above n 6, 1317; Stone, above n 88, 688; Victor Brudney, ‘The First Amendment and Commercial Speech’ (2012) 53 \textit{Boston College Law Review} 1153. Similarly, with respect to the equal protection clause, laws regulating gender, illegitimacy, mental retardation, alienage, wealth and age have also been subject to variable levels of scrutiny: Fallon, above n 6, 1318; Edward Barrett, ‘Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications’ (1979) 68 \textit{Kentucky Law Journal} 845, 852-4.
Third, there appears to have been a considerable softening in the ‘bite’ of the strict scrutiny standard. Justice O’Connor has relatively recently observed, for example, that ‘[t]he fact that strict scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny’.\(^{114}\) Similarly, Cass Sunstein has noted that there has been ‘at least a modest convergence away from tiers and toward general balancing of relevant interests’.\(^{115}\) Recent empirical studies appear to support these views, concluding that free speech restrictions subjected to strict scrutiny end up surviving constitutional challenge in approximately 22% of cases.\(^{116}\)

Finally, a relatively new ‘intermediate level’ of scrutiny has recently been introduced.\(^{117}\) This test imposes additional requirements above the rational basis test, such as that ‘the legislation’s purpose be an important governmental interest and that the means selected should bear a substantial relation to fulfilling the purpose’,\(^{118}\) but does not go so far as strict scrutiny. It has been suggested that the ‘the introduction of an intermediate tier of scrutiny signals that the Supreme Court no longer feels the need for the degree of self-discipline that it once developed a mostly two-tiered doctrinal structure to provide’.\(^{119}\)

The collapse of the two-tiered system of categories can perhaps be traced to the most troubling aspect of this judicial approach: the twin problems of under and over-inclusiveness. The problems are inherent to rule-based systems, since, on the one hand, rules by their nature ‘capture the background principle or policy incompletely’\(^{120}\) and on the other hand, they are applied rigidly. Thus, when rules are applied they will occasionally lead to results where ‘the overall balance of reasons dictates a different result’.\(^{121}\) So, for example, content-based regulations in


\(^{116}\) Winkler, above n 10, 815. The study was limited to a dataset that spanned reported federal law cases decided between 1990 and 2003.

\(^{117}\) Also known as ‘rational basis with bite’: Ibid 808-9.

\(^{118}\) Barak, above 6, 515. On the development of intermediate scrutiny, see: Fallon, above n 6, 1298.

\(^{119}\) Ibid 1300.

\(^{120}\) Sullivan, above n 61, 58.

the context of the First Amendment are subject to the higher standard of strict scrutiny. This is because it is assumed that if a regulation is content-based, the legislature must be motivated by ‘animus toward the ideas contained in the regulated speech’. Regulation on this basis is therefore deemed ‘an impermissible government intervention in the marketplace of ideas’. But this is only an assumption, and may be incorrect in a particular case. Furthermore, even if the assumption is correct, the regulation in question might intrude on freedom of speech so slightly that, when considered contextually, the incursion might otherwise be deemed justified. In both scenarios the rule would have operated over-inclusively. On the other hand, content-neutral regulation is assumed not to be motivated impermissibly, and is usually waived through on rational basis review, even though it might have the potential to affect expression more devastatingly. In such a case, the rule is said to have operated under-inclusively.

It has been observed that under and over-inclusiveness is tolerated within systems that adhere to rules because they offer simplicity and certainty, and ‘it is not always practicable, given limited resources, to determine every case in the light of the full panoply of applicable aims or principles’. Nevertheless, rules operating under and over-inclusively have the potential to create two undesirable phenomena. The first is that courts might try to fit unusual cases into existing categories in a formalistic way, producing absurd results.

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124 This has led Justice Kagan, joined by Justices Ginsburg and Breyer, to suggest that that strict scrutiny should only be applied to content-based regulations when there is a ‘realistic possibility that official suppression of ideas is afoot’: Reed v Town of Gilbert (2015) 576 US ___ (slip op., at 5) (Justice Kagan).
127 This has arguably been the outcome of the majority decision in Reed v Town of Gilbert (2015) 576 US ___. The Town of Gilbert, Arizona, had enacted an ordinance – the Sign Code – which designated particular sizes, locations and times of display for signs if they fell into one of the following categories: ‘Ideological Signs’, ‘Political Signs’ and ‘Temporary Directional Signs’. A local church challenged the ordinance on the basis that it was an infringement of the First Amendment. A majority of the US Supreme Court agreed, reaching the conclusion that the ordinance was a content-based regulation and did not survive strict scrutiny.
The second is that a court might seek to avoid an obviously absurd result but in the process ‘employ often inconsistent, unprincipled, or ad hoc rules to allow it to reach common sense results in many cases where those results would otherwise be elusive under current doctrine’.\(^\text{128}\) The outcome is a form of judicial reasoning which ends up conducting ad hoc balancing in ‘hard cases’,\(^\text{129}\) while hypocritically professing to adhere to a method for which one of the primary claims to supremacy is its ability to avert the need for balancing altogether. This dissonance has led to a significant weakening of the system of tiered review as a mechanism of judicial restraint, to the point where some judges have begun to claim that the level of scrutiny now ‘says nothing about the ultimate validity of a particular law’\(^\text{130}\) and that ‘context matters’.\(^\text{131}\)

Despite some predictions that structured proportionality would devolve into a rule-based, categorical method, the reverse is just as possible.\(^\text{132}\) Rules and categories may work reasonably well for routine cases. However, as more ‘hard’ cases appear on the lists of constitutional and apex courts over time, judges deciding them are likely to need a degree of flexibility to respond contextually to the unique considerations raised by them. One of the principal concerns with the categorisation approach is that, when it is adhered to, it produces predetermined outcomes in a rule-like way, potentially leading to unwanted results in these kinds of cases. In other words, the approach has the potential to push judicial restraint so far that layers of abstraction and approximation divorce the outcome from a case’s underlying fact and context-specific complexity. In resisting these results, courts may be tempted to veer away from the confines of the tiered system of review. However, by doing so, they undermine the very thing that is said to be the system’s greatest strength: its capacity to operate as an effective mechanism of judicial restraint.

\(^{128}\) Barry McDonald, ‘Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression (2006) 81 Notre Dame Law Review 1347, 1430. See also, Schauer, Categories, above n 20, 297; Mathews and Sweet, above n 74, 800.


\(^{132}\) Aharon Barak has observed that ‘It is fair to assume that the two systems will converge in the future, and US law is already showing the first signs of adopting proportionality’: Aharon Barak, ‘Proportionality (2)’ in Michel Rosenfeld and Andras Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 739, 754.
restraint. It is perhaps for this reason that some commentators have concluded that ‘[p]roportionality is not beyond criticism, but categorization is not the answer’. 133

VI. CONCLUSION

Because the US has remained largely shielded from constitutional developments which have taken place elsewhere, including the migration of structured proportionality into constitutional judicial review, it offers an ideal setting for seeking alternative judicial methods to proportionality. Indeed, at least three distinct approaches – formalism, ad hoc balancing and tiered review based on categorisation – have been developed over time in that jurisdiction to address ‘balancing problems’.

However, when these potential alternatives are evaluated for their effectiveness in assisting the judiciary to resolve ‘balancing problems’ and respond contextually to the legitimacy and competency of the courts to decide concrete cases, we find the American approaches tend to fall short. Formalism, for example, incorrectly assumes that it is possible to define in the abstract the complex value set from which freedom of speech draws. Thus, the approach often fails to deal with dimensions of the guarantee which only become apparent when raised in novel circumstances. Further, by focusing on producing a theoretically-consistent area in which freedom of speech can operate absolutely, formalism tends to define the true scope of the area of protection unjustifiably narrowly.

By contrast, the flexibility encompassed within the ad hoc balancing approach arguably makes it a much more appropriate decisional technique for addressing the complexities raised by ‘balancing problems’. It provides sufficient decisional space for judicial discretion to be exercised in a manner that responds contextually and evaluatively to the considerations relevant to deciding a ‘hard’ case. On the other hand, because the method offers little guidance as to how the exercise of judicial discretion might be conditioned by restraint, it does little to respond to concerns regarding judicial legitimacy and competency in making difficult factual and value judgments. It is charged with devolving into nothing more than judicial policy-

133 Ibid.
making. One response to this criticism has been to apply ad hoc balancing with an extreme level of deference. However, this has tended to raise further concerns regarding judicial abdication of the constitutional function of review.

The modern American approach can be described as tiered scrutiny based on categorisation. In some ways, it is a half-way house between the two methods described above. Under this approach, a court first decides whether a case falls into an existing category which attracts *prima facie* constitutional protection. If it does, then the Court categorises the regulation under challenge, applying a higher degree of scrutiny to some kinds of regulation than others. In theory, the outcome of tiered scrutiny based on categorisation is almost pre-determined such that strict scrutiny will result in the invalidation of laws while less intense tests, such as rational basis review, will not. In this way, the method is said to operate as a vehicle of judicial restraint: judges need only be concerned with the ‘legalistic’ task of categorising a case rather than the policy-oriented task of making contextual value judgments that involve balancing competing interests.

The categorisation process has, however, led to considerable difficulties. The categories are difficult to identify and define, numerous exceptions have been found, new categories and tiers of review have been generated and the assumed determinism of the system has been subject to significant challenge. Many of these difficulties can be traced to the overarching problems of under and over-inclusiveness which plague the categorisation approach. These problems have led to absurd results where the rule-like rigidity of categorisation is adhered to even when common sense would suggest a different result in the circumstances. They have also encouraged a judicial inclination to veer away from the strictness of the tiered system in order to avoid absurd outcomes, and retreat back to what is essentially an ad hoc balancing approach. The latter tendency has led to a significant weakening of the system’s capacity to operate as an effective mechanism of judicial restraint.

When the American approaches are compared with what can be understood of structured proportionality from preceding chapters of this thesis, the contrast becomes compelling. On one hand, structured proportionality leaves considerable discretion in the hands of judges to decide cases contextually and in a manner
sensitive to novel facts and broader circumstances. Unlike formalist or categorical approaches, therefore, structured proportionality does not require the creation of exceptions or modifications in order to accommodate ‘hard’ cases. On the other hand, structured proportionality avoids the complete unpredictability and absolute discretion associated with ad hoc balancing, involving as it does a series of predictable tests structured in a predictable sequence. It is therefore far less likely to be open to the charge that it encourages unrestrained exercises of judicial discretion. The probability of that charge arising is reduced even further when structured proportionality is coupled with a robust and contextual theory of judicial restraint. When so coupled, the intensity of review conducted under structured proportionality is capable of responding flexibility to concerns regarding judicial legitimacy and competency without abdicating the function of judicial review. In light of this comparison, it might be said that structured proportionality is not just an appropriate analytical tool in assisting in the resolution of a ‘balancing problem’ in constitutional adjudication, but it is also the most desirable of the available alternatives.

134 This feature of proportionality also lends itself to the critique that the method has the potential to encourage excessive judicial discretion. For a deeper engagement with this critique, see Chapter 4 of this thesis at pp 100-110.

135 In this regard, it might be said that proportionality is too limiting of judicial discretion. For a discussion of this critique, see Chapter 8 of this thesis at pp 263-5.

136 This claim is also supported by empirical evidence. See, Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (Cambridge University Press, 2017) 158-182.
The focus of Part I of this thesis was to establish a theoretical framework to explain the role of structured proportionality in constitutional adjudication and thus provide an account of the circumstances in which it might be viewed as an appropriate analytical tool in that context. To that end, it was observed that structured proportionality’s conceptual foundations can be traced to classical Greek and Roman philosophy, eventually taking shape as a legal method in the early theory of just war. Through this lineage it emerged in the 19th century administrative law of Prussia as a judicial method by which the courts sought to reign in an increasingly powerful police state. As a limit on state power, it was theorised as involving both an analysis of the relationship between an end and the means used by the state to achieve that end, as well as an assessment of the ultimate importance of the end itself when compared to its impact on other rights and interests. These two stages of analysis can be likened to the necessity and strict proportionality stages of structured proportionality as it is widely understood today. Nonetheless, despite this full form of structured proportionality being theorised, the practice of the Prussian administrative courts was to apply the means ends analysis aspect only. This restrained approach reflected the precarious position of these institutions in their exercise of quasi-constitutional power during this period.

After the ratification of the Basic Law during the German reconstruction in the period following World War II, the position began to change. The entrenched constitutional status of the newly created and specialist Federal Constitutional Court gave it an institutional legitimacy its administrative predecessors lacked.
Nonetheless, the Constitutional Court was slow to flex its muscles. On one hand, being a new institution presided over by appointees who had been trained in a previous era, it sought to cautiously continue the legal scientific tradition that had been a hallmark of German jurisprudence in the 19th century. That tradition saw law as divorced entirely from politics and as a closed system of pure rational reasoning. On the other hand, the post-war era in Germany was a period in which many sought significant transformation in institutions of government as a bulwark against the repetition of recent horrors. In that vein, the Constitutional Court increasingly viewed itself as playing a central role in the regeneration of the German state. Its growing legitimacy meant that over time, it felt secure enough to embrace forms of analysis that extended beyond that which was acceptable within the strict confines of the legal scientific tradition, particularly in regards to adjudicating upon constitutional values. The Constitutional Court’s eventual embrace of the full form of structured proportionality, including both the necessity and strict proportionality stages, reflected a compromise between these traditional and transformative influences. Structured proportionality continued the ideals of the legal scientific tradition through its predictable, sequential structure and commitment to rational reasoning. On the other hand, in its transformative aspect, it enabled value-laden decision-making by an apex constitutional court.

Although the Constitutional Court did not, of its own accord, explain why structured proportionality was thought to be an appropriate analytical tool in its jurisprudence, Part I of this thesis observed that an explanation was later provided by German legal theorists, most notably Robert Alexy in his seminal work *A Theory of Constitutional Rights*. In that work, Alexy explained that where in constitutional adjudication a conflict between two ‘principles’ arises, then a balancing approach will be required in order to resolve that conflict. In other words, the relative normative value or importance of each interest will need to be weighed in order to decide whether the incursion of one interest into the other is justified. The stages of structured proportionality assist in heuristically conducting the balancing exercise in a predictable sequence. The suitability stage establishes whether there is a rational connection between a legitimate end and the means used to achieve that end, the necessity stage assesses whether there are alternate means available to
achieve the same end with less restrictive effect on the competing interest, and the
*strict proportionality* stage involves an appraisal of the relative normative value of
each competing interest and whether the difference between them justifies one’s
encroachment upon the other. Part I of this thesis sought to extend Alexy’s theory
further by using the jurisprudence of the Constitutional Court to explain that a
competition between ‘principles’ can be identified as arising when there is: (a) a
conflict between two sets of rights or interests; (b) both of which are on the same
*prima facie* normative (constitutional) plane; (c) neither of which is absolute; and
(d) at least one of which cannot be defined in the abstract. That kind of problem can
be considered a ‘balancing problem’ to which structured proportionality might be
applied as an appropriate analytical tool for reasoning to the problem’s resolution.

Since structured proportionality was born out of a compromise between two
competing forces in German legal culture – legal science and transformative
constitutionalism – it was contended in Part I of this thesis that its structure is
neutral towards institutional roles, particularly those of the judiciary vis-à-vis the
legislature. That is, structured proportionality does not reflect a pre-determined
position as to the weight that should be given to a state interest versus an individual
right, nor does it insist that any particular position be taken in relation to judicial
derference to the legislative branch. In that sense, structured proportionality can be
used flexibly to respond to institutional considerations as required. By the same
token, however, there is an imperative to couple the application of structured
proportionality with a robust and contextual theory of judicial restraint such that
institutional assumptions do not go unstated despite their underlying influence in a
particular context. It was argued in Part I that contextual institutional theories of
judicial restraint provide the most responsive and coherent basis for applying
structured proportionality at variable intensities of review. When coupled with such
a theory, it was argued, structured proportionality becomes capable of responding
to empirical (factual) and normative uncertainty in constitutional adjudication in a
contextually and institutionally sensitive manner.

Finally, Part I of this thesis sought to compare structured proportionality (when
coupled with a contextual institutional theory of judicial restraint) against other
methods which have developed to respond to similar types of ‘balancing problems’.
After examining formalism, ad hoc balancing and tiered review based on categorisation, it concluded that these methods are not as well suited to coping with the character of ‘balancing problems’ and their need for contextually and institutionally responsive judicial methods. Although ad hoc balancing fares better on this front than its formalist and categorical cousins, it veers too far in the direction of unrestrained judicial discretion to appease in contexts where greater judicial restraint is called for. As such, Part I of the thesis concludes that not only is structured proportionality, when coupled with a robust and contextual theory of judicial restraint, an appropriate analytical tool when a ‘balancing problem’ arises, it is the most desirable of the available alternatives.

The thesis now turns in Part II to apply the theoretical framework established in Part I to develop a deeper understanding of Australian constitutional jurisprudence on proportionality as it has evolved in the areas of characterisation of laws, the express freedom of interstate trade and commerce in s 92, and the implied freedom of political communication.
CHAPTER 6.

PROPORTIONALITY IN THE CHARACTERISATION OF LAWS

I. INTRODUCTION

Characterisation in Australian constitutional law is the process of testing the validity of a Commonwealth law by reference to whether it has been made ‘with respect to’ a head of power contained in the Australian Constitution. In the context of characterisation, the claim that proportionality has some role to play is commonly put forward. However, this role is said to be limited to the so-called ‘purposive’ heads of power. For example, French CJ observed recently in *Tajjour v New South Wales* that in the earlier case of *Davis v Commonwealth* it had been suggested that proportionality was ‘relevant to the constitutional validity of any purposive legislative power’. On the other hand, French CJ noted that proportionality did not apply with respect to ‘non-purposive powers.’ It has been said that in relation to

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2. See, for example, Gabrielle Appleby, ‘Proportionality and Federalism: Can Australia learn from the European Community, the US and Canada?’ (2007) 26 *University of Tasmania Law Review* 1, 2.
5. *Tajjour v New South Wales* (2014) 254 CLR 508, 546 [29]. In *Leask v Commonwealth* (1996) 187 CLR 579, Brennan CJ observed that ‘proportionality is a concept used to ascertain whether an Act achieves an effect or purpose within power’: at 593. Even Dawson J, a forceful critic of the use of proportionality generally, conceded in *Nationwide News v Wills* (1992) 177 CLR 1 that ‘[r]easonable proportionality may provide a test of validity where a purposive power is concerned.’: at 89.
non-purposive powers, the test of a law’s validity is decided by reference to whether the law has ‘a sufficient operation upon – a sufficient connexion with – something forming part of the subject matter of the power’,\(^7\) rather than proportionality. There appears, therefore, to be a relatively established dichotomy in the jurisprudence between the acceptance of proportionality in the context of the so-called ‘purposive’ powers but not the ‘non-purposive’ powers.

On the other hand, there has been significant critique of the notion that there are inherently ‘purposive’ powers in s 51 and that proportionality is only permissible in the characterisation of laws with respect to those powers. For example, Gabrielle Appleby has observed that the ‘term ‘purposive’ powers is problematic’ and that the ‘current use of proportionality in characterisation of ‘purposive’ powers is ad hoc and unsatisfactory’.\(^8\) Similarly, Jeremy Kirk has noted that there have been ‘significant disagreements and misunderstandings’ as to whether and when proportionality applies in characterisation, as well as to ‘what it involves and how it relates to previous approaches in the area’.\(^9\) Justice Kirby has also expressed difficulty with embracing the proposition ‘that proportionality might be an appropriate criterion for some paragraphs of s 51 of the Constitution yet impermissible in respect of others’.\(^10\)

Given these differences in opinion, one aim of this chapter is to understand why a distinction has been drawn between the so-called ‘purposive’ and ‘non-purposive’ powers. In light of the theoretical framework developed in Part I of this thesis, the chapter also seeks to establish whether characterisation is an area in which the ‘balancing problem’ arises and thus where structured proportionality might be considered an appropriate analytical tool. In doing so, the chapter looks to understand what role proportionality currently plays in this jurisprudence to,

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\(^7\) *Nationwide News v Wills* (1992) 177 CLR 1, 89 (Dawson J), cited with approval in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 323 (Brennan J).

\(^8\) Appleby, above n 2, 31.


ultimately, engage with a prescriptive argument as to whether that role is justified and should continue.

In pursuit of these aims, the chapter is divided into three substantive sections. Having regard to the prevailing view that proportionality has some role to play with respect to the so-called ‘purposive powers’, Section II explores whether there is indeed something inherently and identifiably ‘purposive’ about these heads of power. Section III then goes on to consider whether there is an explanation for why proportionality has been widely accepted as having a role in characterising laws with respect to the so-called ‘purposive’ powers. Finally, in Section IV, the various meanings that have been ascribed in this context to the term ‘proportionality’ are unpacked. They are critically assessed in light of the theoretical framework developed in Part I of this thesis. In that process, the ‘disagreements and misunderstandings’ that have arisen in this area of jurisprudence are also considered.

II. THE ‘PURPOSIVE’ POWERS

At least since Dixon J’s judgment in *Stenhouse v Coleman*,¹¹ there has been a view that contained within s 51 of the Constitution are legislative powers which are inherently ‘purposive’ in their nature. However, discerning which powers qualify as ‘purposive’ and which do not has been the subject of considerable debate.¹² It has been suggested that the category of ‘purposive’ powers includes the defence power and the treaty implementation aspect of the external affairs power.¹³ Suggestions have also been made from time to time that the express and implied

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¹¹ (1944) 69 CLR 457.
incidental powers and the aliens power may be purposive, although these views have not received majority support in the cases.\(^{14}\)

Given the enduring nature of the distinction between the ‘purposive’ and ‘non-purposive’ powers, one would assume that there is something inherently ‘purposive’ about the so-called purposive powers which would distinguish them. One would also assume that, upon isolation, this characteristic would explain why these powers have been viewed as having some connection with proportionality analysis. In search of this characteristic, each of the heads of power which has been suggested in the jurisprudence as being ‘purposive’ or having a ‘purposive’ aspect is considered in the following section. The section also considers those heads of power that would appear to be ‘purposive’ on a textual reading but which have not been held to be so.

A. The defence power

At least insofar as the defence power\(^{15}\) is concerned, there has not been much doubt in the High Court’s jurisprudence that it is a ‘purposive’ power. Indeed, the notion of a distinction between purposive and non-purposive heads of Commonwealth legislative power can be traced to early defence power cases. In *Farey v Burvett*,\(^ {16}\) which concerned the validity of Commonwealth regulations on the price of bread during the First World War, a majority of the Court gave the defence power a purposive interpretation, suggesting that any government regulation connected in some real way to the achievement of object of ‘defence’ was within the scope of the power.\(^ {17}\)

\(^{14}\) *Plaintiff S156 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 44-5 [34]-[36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *R v Alqudisi* (2015) 300 FLR 11, 35 [118] (Adamson J). In 1997, Jeremy Kirk considered two further Commonwealth powers as falling within the category of ‘purposive’: the implied nationhood power ‘to legislate on matters relating to Australia’s status as a nation’ and the power to legislate with respect to federal elections: Kirk, above n 9, 22. Neither of these heads of power has been considered sufficiently in the cases as ‘purposive’ and so will not be considered here.

\(^{15}\) Contained in section 51(vi) of the Constitution, which reads: ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to…(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth’.

\(^{16}\) (1916) 21 CLR 433.

\(^{17}\) See, for example, *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffiths CJ).
Thirty years later, in *Stenhouse v Coleman*, Dixon J also adopted the view that the defence power involved ‘the notion of purpose or object’. His Honour’s analysis went on to draw a more general distinction between two types of powers said to be contained in s 51 of the Constitution. On one hand, there were the powers for which:

…the subject of the power is described either by reference to a class of legal, commercial, economic or social transaction or activity (as trade and commerce, banking, marriage), or by specifying some class of public service (as postal installations, lighthouse), or undertaking or operation (as railway construction with the consent of a State), or by naming a recognised category of legislation (as taxation, bankruptcy).

For these types of powers, the Court was to assess the validity of legislation by reference to whether the law operated on or affected the subject matter or answered the description of the power. The purpose or object of the legislation was to be disregarded in conducting this exercise. On the other hand, if a law was made with respect to the defence power, then ‘defence or war’ was the purpose ‘to which the legislation must be addressed’.

Justice Dixon’s analysis in *Stenhouse v Coleman* has been highly influential and later cases have not doubted the correctness of the designation of the defence power as having a ‘purposive’ character. It is, however, what Dixon J did not say in *Stenhouse v Coleman* which has caused considerable difficulty. His Honour’s analysis did not exhaustively stipulate which powers fall into which category, nominating only examples of each. This deficit might have been cured had the analysis instead suggested a principled basis for placing a particular power into one of the two categories. Alas, it did not. The result has been confusion regarding the

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18 (1944) 69 CLR 457.
19 *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).
20 Ibid.
21 *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).
22 See, for example, *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 253 (Fullagar J): ‘In the first place, the power given by s. 51(vi.) of the Constitution is given by reference to the purpose or object of the law and not by reference to some concrete subject matter.’; *Richardson v Forestry Commission* (1988) 164 CLR 261, 326 (Dawson J): ‘The purposive nature of the defence power, which differentiates it from other heads of power, including the external affairs power, makes it necessary to test the validity of a law passed in reliance upon it by reference to the purpose of the law rather than the subject-matter with which the law deals’; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 697 (Gaudron J): ‘The defence power has been described as a “purposive power” meaning that it will support a law which is reasonably capable of being seen as appropriate and adapted to the purpose of defence: see *Stenhouse v Coleman*’. 

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precise powers, beyond the defence power itself, which might be regarded as having a ‘purposive’ character.

B. The treaty implementation aspect of the external affairs power

There were some early indications that perhaps the external affairs power, contained in section 51(xxix) of the Constitution, which reads: ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:…(xxix) external affairs’.

24 (1936) 55 CLR 608.
25 Ibid 674 (Dixon J).
27 Ibid 232 (Brennan J).
28 Ibid 260 (Deane J).
30 Ibid 326 (Dawson J).
implementation aspect of the external affairs power as having a purposive
dimension.\textsuperscript{33}

\textit{C. Is the incidental power ‘purposive’?}

Deciding whether or not the incidental power\textsuperscript{34} is ‘purposive’ is a more contentious
proposition. In \textit{Cunliffe v Commonwealth},\textsuperscript{35} Brennan J expressly referred to the
incidental power as ‘a purposive power’.\textsuperscript{36} Other members of the Court have been
more guarded on this front but nonetheless suggested that a purposive approach is
required in order to assess the validity of laws purported to have been made with
respect to the incidental powers. For example, in \textit{Cunliffe v Commonwealth}, Mason
CJ proposed that where a law does not operate directly on the subject matter of a
power in s 51, it can nevertheless be valid when it is ‘designed to achieve an end
within power, even though it operates on a subject matter beyond power’.\textsuperscript{37}
Similarly, in \textit{McCloy v New South Wales}, the majority joint judgment observed that
laws with respect to incidental powers ‘must serve the purposes of the substantive
powers authorising the making of laws to serve a specified purpose.’\textsuperscript{38}

The position has resonance in circumstances where the incidental power operates
in connection with an inherently purposive power – like the defence power.
Speaking of the defence power in the \textit{Australian Communist Party v Commonwealth},\textsuperscript{39} Fullagar J suggested that there are two aspects to the power. The
first is relied on in circumstances where a law operates directly to achieve the object
of defence, such as ‘the enlistment (compulsory or voluntary) and training and

\begin{footnotesize}
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\item See, for example, Gleeson, above n 13, 11; George Williams, Sean Brennan and Andrew Lynch,
\textit{Blackshield & Williams Australian Constitutional Law and Theory} (Federation Press, 6\textsuperscript{th} ed,
2014) 789.
\item For the purposes of this analysis no distinction is drawn between the implied incidental power,
which derives from the common law notion that a grant of power carries with it all that is required
to make effective the grant, and the express incidental power contained in s 51(xxxix), which
reads: ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace,
order, and good government of the Commonwealth with respect to: . . . (xxxix) matters incidental
to the execution of any power vested by this Constitution in the Parliament or in either House
thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any
272, 351 (Dawson J).
\item (1994) 182 CLR 272.
\item Ibid 322.
\item Ibid 296 (Mason CJ).
JJ).
\item Australian Communist Party v Commonwealth (1951) 83 CLR 1.
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equipment of men and women in navy, army and air force, the provision of ships and munitions, the manufacture of weapons and the erection of fortifications’. Such outcomes can be pursued in peacetime or wartime, with the surrounding circumstances having very little bearing on the determination of whether these activities are carried out for defence purposes.

On the other hand, there may be certain activities statutorily regulated which ‘could not be regarded in the normal conditions of national life as having any connection with defence’, such as caps on the price of goods. With respect to such laws, it is the incidental aspect of the defence power which is relied upon as the relevant head of power. Such reliance can only be placed in a state of war or national emergency, and the validity of the law will turn on whether it is a ‘means adopted to secure some end relating to the prosecution of the war’. Thus, we can see that with respect to an inherently purposive power, like defence, limiting the incidental aspect by reference to purpose is analytically coherent since the purpose is to be found in the head of power itself.

The situation is quite different, however, with respect to the operation of the incidental powers in connection with subject matter powers. It has been suggested that to establish the validity of a law reliant on the incidental area of a subject matter power the law must be directed at an end that is ‘within power’. That is, it must be directed to an end which could be considered to fall within the scope of the primary subject matter power from which the incidental power derives its incidental character. The difficulty is that on a textual reading most subject matter powers are not directed towards any immediately discernible purpose; hence their very designation as subject matter powers in the first place.

For the purposes of illustrating the aforementioned difficulty, we might imagine a law regulating the traffic of shipping vessels prohibiting them from travelling within twenty nautical miles of the Australian coast. We might also imagine that the law has been made for the purpose of avoiding ship wrecks in areas where there

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40 Ibid 254 (Fullagar J).
41 Ibid.
42 Ibid 255 (Fullagar J).
43 Ibid.
are few or no lighthouses. Since it does not directly regulate ‘lighthouses, lightships, beacons and buoys’, a law of this kind could not be said to be made directly with respect to any of these matters such as to bring it within the core area of operation of s 51(vii). An argument might be run, however, that it falls within the incidental area of that power. Under the purposive approach, the court would need to discern whether the purpose to which this imaginary law was directed was within the scope of the s 51(vii) power. It would, however, have considerable difficulty deciding whether the purpose of avoiding ship wrecks falls within the purpose of the power since the text of s 51(vii), and in particular the phrase ‘lighthouses, lightships, beacons and buoys’, does not shed any light in this regard. It was a point made by Dawson J in *Cunliffe*:

> It is to my mind simply not sensible to ask whether a law is reasonably appropriate and adapted to the main purpose or object of lighthouses, for example, to ascertain whether it deals with matters which are truly incidental to lighthouses. There is no relevant purpose or object (in the sense of objective) in the power to make laws with respect to lighthouses any more than there is a relevant purpose or object in the power to make laws with respect to taxation. Indeed, the approach of Menzies J. was rejected as impermissible when he attempted to introduce a purposive element to the taxation power in order to characterize a hypothetical law imposing a special prohibitive tax on income derived from the sale of heroin as a law with respect to trade in the drug rather than as a law with respect to taxation.45

The problem was acknowledged by Mason CJ in *Nationwide News*, who observed that ‘very few of the Parliament’s legislative powers are truly purposive powers’ and that the ‘ascertainment of what is the main purpose or object of a particular power may in some cases be a matter of some difficulty’.46 In resolution of this conundrum, in *Leask*, both Dawson J47 and Brennan CJ48 suggested that it is the purpose of the law rather than the purpose of the *power* that is relevant to the question of validity. However, that suggestion raises further difficulties.

First, if it is only the purpose of the law which is relevant to the analysis, how is the question of whether that purpose is ‘within power’ to be decided without also

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46 *Nationwide News v Wills* (1992) 177 CLR 1, 27 (Mason CJ).
considering the purpose of the power? Second, on this kind of analysis, what relevant difference remains between relying on the ‘purposive’ incidental aspect of a power and the main subject matter aspect of that same power? The purpose of the law is capable of being relevant to the latter inquiry just as much as it is to the former, as Brennan CJ acknowledged in Leask:

Sometimes, as I pointed out in Cunliffe v The Commonwealth, “a connection with a head of power may be revealed more clearly by stating the purpose or object which the law is appropriate and adapted to achieve than by describing the law’s effect and operation on particular rights, duties, powers and privileges”. But, as Dawson J points out, “purpose” in this context refers to the purpose of the law, not the purpose of the head of power.49

If the test is the same with respect to both the core area of the subject matter power and the incidental area of that power, as Brennan CJ seemed to suggest in Cunliffe,50 then why have an incidental area of power at all? These considerations make it difficult to escape the conclusion that ‘the incidental/central divide provides no relevant rational distinction for seeking to protect particular rights in some cases involving a power and not in others’.51

D. Is the aliens power ‘purposive’?

Difficulties have also arisen with respect to whether the aliens power52 might be considered ‘purposive’. In Cunliffe v Commonwealth, Brennan J forcefully held that the ‘aliens power does not have a purposive aspect’.53 On the other hand, some commentators54 have suggested that in Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs,55 Gaudron J implicitly advocated a purposive reading of the power:

49 Ibid.
51 Kirk, above n 9, 36.
52 Contained in section 51(xix) of the Constitution, which reads: ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:…(xix) naturalization and aliens’.
...a law imposing special obligations or special disabilities on aliens, whether generally or otherwise, which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required, is not, in my view, a valid law under s. 51(xix) of the Constitution.56

In Plaintiff S156 v Minister for Immigration and Border Protection,57 the plaintiff argued that two provisions of the Migration Act 1958 (Cth), ss 198AB and 198AD, were constitutionally invalid. The provisions authorised the Minister to declare a country a ‘regional processing country’ and authorised an officer to effect the removal of an ‘unauthorised maritime arrival’ to a regional processing country, respectively. The plaintiff submitted that the purpose of these laws was to: (1) control entry into Australia; and (2) deter unauthorised arrivals to Australia by boat. In authorising detention after removal from Australia, the plaintiff contended the provisions went beyond what was reasonably necessary to achieve these purposes and were therefore lacking proportionality. In support of this view, the plaintiff relied in part on observations made by Gaudron J in Chu Keng Lim, quoted above.

A six-member Court unanimously dismissed the plaintiff’s contentions. The Court accepted the Commonwealth’s characterisation of the laws in question, finding that their legal operation and effect went only so far as to authorise removal from Australia.58 As such, the laws operated directly upon a matter forming part of the aliens power59 and the incidental aspect of that head of power was not engaged. No further inquiry into the purpose of the law was, according to the Court, necessary.60 The Court made clear that Gaudron J’s observations in Lim ought to be interpreted as referring to laws that operated ‘with respect to aliens beyond their removal’, and thus that she was speaking of an exercise of the incidental area of power in her observations.

56 Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 57 (Gaudron J).
58 Ibid 43 [25], 44 [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
Whether or not the Court’s interpretation of Gaudron J’s observations in *Lim* were faithful to her Honour’s intention in making them, it is difficult to accept the distinction made by the Court without also needing to accept that it necessarily generates a purposive interpretation of the aliens power. The Court is – in effect – saying that if an exercise of the aliens power is directed to achieving the purpose of *removal* of aliens then this will be within power. If, however, an exercise of the aliens power is directed to achieving a purpose ‘beyond their removal’ then only the incidental power will be engaged. This is despite the fact that the subject matter of each exercise of the power is regulation of ‘aliens’ and, ordinarily, this would be sufficient to satisfy the ‘connection to subject matter’ test. The only distinction between the two types of laws is the *purpose* to which they are directed, not their subject matter.

On the other hand, *Plaintiff S156* was not a case in which the distinction between detention for the purposes of facilitating removal and detention after removal was directly in issue. The issue did, however, arise in the more recent case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection*. In that case, the plaintiff challenged the validity of s 198AHA of the *Migration Act 1958* (Cth) arguing, amongst other things, that the provision was unsupported by any head of Commonwealth legislative power. The plaintiff contended that the Commonwealth’s procurement of and participation in the plaintiff’s detention on Nauru was unlawful since any statutory authority to effect detention is subject to the principle established in *Chu Kim Lim v Minister for Immigration, Local Government and Ethnic Affairs*. In *Chu Kim Lim*, Brennan CJ, Deane and Dawson JJ held that laws authorising executive detention will only be valid exercises of the aliens power:

if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport and alien. In that event, they will be of a

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61 (2016) 257 CLR 42.
punitive nature and contravene Ch. III’s insistence that the judicial power of the Commonwealth by vested exclusively in the courts which it designates.\textsuperscript{63}

There appeared to be unanimous agreement in \textit{M68/2015 v Minister for Immigration and Border Protection}\textsuperscript{64} (including from Gordon J in dissent) that the above passage contained the correct statement of principle.\textsuperscript{65} Nonetheless, the passage itself is capable of being interpreted in different ways, depending on where the emphasis is placed. The first interpretation is to see the maintenance of Chapter III as the prevailing concern, with the consequent requirement that the any law authorising executive detention be for a non-punitive purpose. If that emphasis is accepted, then a law authorising detention by the Commonwealth \textit{after} removal from Australia has already been effected – such as that in question in \textit{M68} – could still be a valid law so long as and to the extent that it facilitated the non-punitive purpose of processing of the plaintiff’s visa application by Nauru. The approach taken by two majority justices appeared to adopt this interpretation.\textsuperscript{66}

The second, more narrow, interpretation of the passage is to say that the Chapter III concern has been funnelled down to the more precise rule that, to preserve their validity, laws authorising detention must be made specifically for the purposes of deportation from Australia or to enable an application for entry into Australia to be made. This interpretation of the passage means that once an individual has been removed from Australia – as the plaintiff had been – with no further processing left to determine re-entry into the territory, the aliens power cannot support the authorisation of executive detention. This was the interpretation applied by Gordon J in dissent.\textsuperscript{67} It was also the one that formed the basis of Keane J’s approach (in the majority on the result), with his Honour reasoning that the authorisation of executive detention after removal was lawful as it was reasonably necessary to facilitate removal from Australia (since Nauru would not have accepted the plaintiff

\textsuperscript{63} Ibid 33 (Brennan, Deane and Dawson JJ).
\textsuperscript{64} (2016) 257 CLR 42.
\textsuperscript{65} Ibid 70 [40] (French CJ, Kiefel and Nettle JJ); 86 [98] (Bell J); 111 [183]-[184] (Gageler J); 130 [260] (Keane J); 160 [380] (Gordon J).
\textsuperscript{66} Ibid 87 [100] (Bell J); 111 [183]-[185] (Gageler J).
\textsuperscript{67} Ibid 160 [378]-[381], 162 [388], 163 [391], [393] (Gordon J).
into its territory without such participation by Australia). The remaining three majority judges did not consider the issue.

On either interpretation, the limitation applied to the aliens power as a result of Chapter III considerations means that the resultant power is less wide in scope than the full breadth of its subject matter might suggest. That is, the power cannot be used to legislatively authorise executive detention of aliens except where the purpose of that detention is either: (a) non-punitive; or (b) directed at facilitating removal from or processing an application to stay in Australia. An argument could, therefore, be mounted that at least this aspect of the aliens power (authorising executive detention) has been transformed into a purposive power.

The argument would, however, run up against Gageler J’s assertion in M68 that the reach of the aliens power is not subject to ‘purposive limitation’. Justice Gageler did not provide reasons for adopting such a view, but one might speculate that it rests on the idea that there is nothing inherently purposive about the aliens power. To the extent that Chapter III limitations might be applied such as to give the aliens power a purposive aspect, such limitations would be equally applicable to any other head of power in s 51, including those which have always been considered subject matter powers only.

For present purposes, it is unnecessary to reach conclusion as to which view is preferable. What is pertinent, however, is that there remain unsettled questions regarding the ‘aliens’ power as a potential constituent of the category of so-called ‘purposive’ powers, lending support to the view that the category itself may have questionable integrity.

E. Are any other powers ‘purposive’?

At the other end of the spectrum sit the s 51 powers with respect to which a pure textual reading would suggest a purposive character but which have not been

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68 Ibid 130-1 [260]-[262] (Keane J).
69 While French CJ, Kiefel and Nettle JJ appeared to acknowledge the Lim principle, they did not apply it to limit the breadth of the Commonwealth’s power to authorise detention and thus did not consider the issue of whether s 198AHA was invalid on that basis: Ibid at 69-70 [40] (French CJ, Kiefel and Nettle JJ).
recognised in the cases as having that character. For example, the conciliation and arbitration power contained in s 51(xxxv) of the Constitution authorises the Commonwealth to make laws with respect to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’. In Nationwide News, Mason CJ suggested a purposive reading of this power, and in particular that the ‘main, if not the sole, purpose or object of the power is the prevention and settlement of interstate industrial disputes’. However, since that observation was made, the High Court has not taken up the point again and the power is largely excluded from academic discussions identifying the purposive powers.

Section 51(xxxi), which provides that the Commonwealth has the power to make laws with respect to the ‘acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws’, could also similarly be argued to have a ‘purposive’ character on a textual interpretation. As Professor Rosalind Dixon has observed, ‘par(xxxi) is phrased in terms of a power to acquire ‘property… on just terms’ for particular purposes (the ‘purpose proviso’) and not simply in terms of power to acquire property simpliciter’. The power in s 51(xxxi) has a dual aspect: it is both a head of power and a limitation on that head of power by way of the ‘just terms’ guarantee. The Court could have given the head of power aspect a purposive interpretation by requiring Parliament to be pursuing a purpose in respect of which it has a power to make laws in order to lawfully effect an acquisition for that purpose. However, rather than recognising the head of power as purposive in this manner, the Court has instead chosen to treat the ‘purpose proviso’ as a formalistic limitation only on the aspect of the power that provides for the just terms guarantee. Thus, where an acquisition is not for a purpose in respect of which Parliament has power to make laws, it is not protected by the just terms guarantee.

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71 Nationwide News v Wills (1992) 177 CLR 1, 27 (Mason CJ).
73 An exception is a brief reference to the power in HP Lee, ‘Proportionality in Australian Constitutional Adjudication’ in Geoffrey Lindell (ed) Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines (Federation Press, 1994) 126, 140, but primarily for the purposes of connecting it with a purposive interpretation of its incidental area of operation.
laws, there is no requirement that the acquisition be on just terms. For this reason, s 51(xxxi) has never been recognised as a purposive power.

Some commentators have suggested in passing that the implied nationhood power might also be considered a purposive power. This categorisation, however, appears not to be based on any inherent characteristic of the power which might suggest purposiveness but rather appears to have been reasoned backwards to explain why the Court has applied proportionality analysis with respect to the power in some cases. In any event, the most recent application of the nationhood power in Pape v Commissioner for Taxation, made no mention of the power being purposive or of proportionality having relevance to the analysis.

Finally, it has been suggested by some commentators that all Commonwealth powers are capable of being given a purposive interpretation. The purpose of a power could be determined from evidence of the intention of the framers, text and context. Of course, the suggestion does not sit neatly with the in the predominant mode of characterisation which emphasises that the purpose of a subject matter power is irrelevant except where its incidental aspect is engaged. However, Leslie Zines has observed that purpose is frequently relied upon even when characterisation is ostensibly conducted by reference to ““popular meaning”, “reality”, specialist meaning or historical matters”. In Zines’ view, such traditional

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75 See, for example, Burton v Honan (1952) 86 CLR 169, 180-1 (Dixon CJ). Even where the acquisition is for a purpose in respect of which Parliament has power to make laws, the application of s 51(xxxi) has been excluded with respect to certain powers, such as bankruptcy and taxation: Attorney-General (Cth) v Schmidt (1961) 105 CLR 361 (Dixon CJ), and copyrights and trademarks: Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 181 CLR 134, 160-1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

76 Similar arguments could be made with respect to other heads of power in s 51. For example, s 51(xxiiiA) provides for the provision of allowances but only for limited purposes, such as unemployment and pharmaceuticals. Similarly, s 51(xxxix) authorises the making of incidental laws only for the purpose of execution of powers vested by the Constitution.


78 Twomey, above n 77, 340-1.


82 Zines, Characterisation, above n 1, 41.
modes of interpretation are ‘often bolstered (perhaps governed) by consideration of why the power was given to the Commonwealth’.  

F. Lack of an obvious connection with proportionality

In light of the above discussion, it is perhaps unsurprising that the concept of ‘purposive’ powers has been described as ‘problematic’ and as contributing to ‘judicial division and legal uncertainty’.  

There appears to be no meaningful way to distinguish between so-called ‘purposive’ and ‘non-purposive’ powers, suggesting that the distinction itself – at least insofar as it might be concerned with finding something inherently ‘purposive’ about certain powers – may be of little analytical utility. Commentators have also observed that the designation creates an enigma: while on one hand constitutional powers are generally conferred on government institutions in order to achieve some object or purpose, on the other hand, only very few Commonwealth legislative powers have been deemed ‘purposive’ in character.

Thus, the ‘purposive’ designation is a somewhat unsettled foundation for, and adds further layers of complexity to, the claim that proportionality analysis is relevant only to assessing the validity of laws purported to have been made with respect to the ‘purposive’ powers. There appears to be little logical connection between proportionality and the purposive powers. Jeremy Kirk, for example, has noted that the ‘limited use of testing for purpose in characterisation’ had been ‘employed as a peg on which to hang proportionality’, but, in his view, it is anomalous that proportionality has been applied ‘to just two of the Commonwealth’s main powers, and to the incidental area of all powers, but not to the central area of most powers.’  

Justice Kirby similarly observed a year earlier that it was ‘difficult, in principle, to embrace the proposition that proportionality might be an appropriate criterion for some paragraphs of s 51 of the Constitution yet impermissible in respect of others’.

His Honour concluded that the application of proportionality in characterisation

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83 Ibid.
84 Appleby, above n 2, 31.
85 Kirk, above n 9, 21.
86 Ibid 36.
bore ‘no reflection in the concept of proportionality in the legal systems from which that concept was originally derived’. 88

III. ‘PROPORTIONALITY’ AS A CONSTRAINT

In the preceding analysis, it was suggested that the powers which have been either accepted or mooted as having a purposive character do not share the common characteristic of being inherently ‘purposive’. However, despite this, it appears logical to assume that there must be at least some reason, however elusive, why a connection has been drawn between the so-called ‘purposive’ powers and proportionality. In the discussion which follows, it will be argued that there is a common thread between these powers: their inherently open-ended nature. This shared characteristic has given rise to a concern on the part of the Court as to their potential use by the legislature to achieve ever-expansive ends, at the expense of other constitutional and extra-constitutional rights and interests. It is the perceived need to constrain the use of this power in some way which has given rise to the use of proportionality, as a vehicle of constraint, with respect to the so-called ‘purposive’ powers.

A. The common thread between the so-called ‘purposive’ powers

With respect to each of the powers designated or mooted as being ‘purposive’, the Court has repeatedly expressed concern regarding their open-ended nature and their potential to be exploited for an ever-expanding set of legislative purposes encroaching upon other rights or interests. In other words, it has been alive to the issue that an inherently open-ended legislative power could be employed by a single institution of government, the federal legislature, to accumulate power at the expense of other institutions and the polity more widely. 89 In this respect, there have

88 Ibid.
89 There are other powers which have also been used expansively by the legislature, such as the corporations power in s 51(xx). However, unlike the so-called ‘purposive’ powers, these powers do not have an inherently open-ended nature. Albeit that it has been given a broad interpretation by the Court, the corporations power is ultimately limited to providing support only for laws which can answer the description of being on the subject matter of ‘corporations’, which is a fixed rather than open-ended category. By contrasting example, the defence power has different meanings at various times. In times of war, it can be used to provide support for a wide range of laws. It is therefore inherently open-ended in its nature.
been three distinct concerns expressed in relation to use of these powers: (i) an undermining of the federal structure established by the Constitution; (ii) an incursion into the rights and interests of individuals; and (iii) a relinquishing to Parliament of the Court’s power to decide the limits of the scope of legislative power.

i. Threats to the federal structure

Since Amalgamated Society of Engineers v Adelaide Steamship Co Ltd,90 any notion of a ‘federal balance’ established by the structure of the Constitution has not been directly applied by the Court as a limitation on Parliament’s legislative powers. Instead, the consistently upheld general principle has been that those powers ought to be construed with all the generality that their words would admit. It is, however, undeniable that in relation to powers that have an inherently open-ended nature, there has been an ongoing concern as to how their exercise might affect the federal structure.

In relation to the defence power, for example, the Court has tolerated an expansion in the scope of the power during periods of war. However, returning to a balance of power between the Commonwealth and the States after a war has not infrequently been offered as a justification for reducing the scope of the power during peacetime. In Australian Communist Party v Commonwealth,91 for example, Williams J held that the ‘defence power can only invade subjects which are in most respects within the domain of State legislation to the extent to which it is reasonably necessary to do so for the purposes of defence.’92 Of course, during peacetime, the list of matters which would properly be regarded as for the ‘purposes of defence’ is necessarily much shorter than in war. In the same case and along the same lines, Dixon J held that the ‘[f]ederal nature of the Constitution is not lost during a perilous war.’93 While his Honour acknowledged that the structure might become ‘obscured’ during wartime due to a broadening of the scope of the defence power, he also insisted that

90 (1920) 28 CLR 129.
91 (1951) 83 CLR 1.
92 Ibid 226 (Williams J).
93 Ibid 203 (Dixon J).
Analogous federal concerns have been expressed in relation to the open-ended nature of the treaty implementation aspect of the external affairs power. Perhaps the most lucid exposition of this concern was put forward by Gibbs CJ in *Tasmania v Commonwealth*. In that case, his Honour observed that the ‘external affairs power differs from other powers conferred by s. 51 in its capacity for almost unlimited expansion’. The Chief Justice then went on to expressly link this characteristic of the power with federal concerns. He noted that the ‘division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity.’

His anxieties in this respect reflected those expressed by Evatt and McTiernan JJ nearly half a century earlier in *R v Burgess; Ex parte Henry*, where they noted that unless Commonwealth powers to implement treaties under the external affairs power were in some way constrained they would ‘be completely destructive of the general scheme of the Commonwealth Constitution’. They were repeated by Wilson J in *Richardson v Forestry Commission*, where his Honour lamented that an

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94 Ibid 203 (Dixon J).
96 Ibid 100 (Gibbs CJ).
97 Ibid; 197 (Wilson J). See also, at 303-4 (Dawson J): ‘It is sufficient to say that it was recognised by the majority [in *Koowarta v Bjelke-Petersen*] that, because of its elastic nature, the phrase “external affairs” itself suggests no precise meaning and that its proper scope is to be determined consistently with the implications arising from the federal nature of the Australian Constitution rather than by reference to the unlimited scope of the treaty-making power. To have done otherwise would have given par. (xxix) of s. 51 the potential to obliterate the limits set by that section upon Commonwealth legislative power. It would have given the paragraph an operation not required by the words of s. 51(xxix), which would have been entirely inconsistent with the context provided by the Constitution and destructive of the federal balance which it was intended to protect.’
98 (1936) 55 CLR 608.
99 Ibid 688 (Evatt and McTiernan JJ). Evatt and McTiernan JJ consequently applied a constraint on the use of the treaty implementation aspect of the external affairs power by insisting that a law in reliance of that power fulfilled ‘all the obligations assumed under the convention’ or ‘the Commonwealth will be exceeding its lawful domain’: at 688.
100 (1988) 164 CLR 261.
‘expansive’ interpretation had been given to the external affairs power which had failed to have regard to the ‘federal character of the Constitution’.  

ii. Incursion upon individual rights and interests

A second concern regarding the open-ended nature of the ‘purposive’ powers has taken the form of emphasis on the effect that exercises of these powers might have on the rights and interests of individuals. In respect of exercises of the defence power, for example, Webb J characterised the problem facing the Court in Australian Communist Party v Commonwealth as a matter which required ‘reconciling defence requirements with the rights and liberties of individuals’. Justice McTiernan made similar observations regarding the impact on individuals of expansive use of the defence power during peacetime. His Honour held that in times of peace, the Constitution had not given Parliament ‘power to make laws for the general control of civil liberties’. Similarly, in Polyukhovich v Commonwealth, Brennan J observed that in war times, ‘laws abridging the freedoms which the law assures to the Australian people’ could be supported ‘in order to ensure the survival of those freedoms in times of peace.’ His Honour observed that in times of peace, however, abridgment of those same freedoms – including the freedom from a retrospective criminal law – could not be supported without establishing a connection with a defence purpose.

Concerns regarding impacts on individual rights and interests have not been limited to exercises of the defence power. In R v Burgess, for example, Dixon J observed of the external affairs power that unless there was a ‘faithful pursuit’ of the external obligation imposed by a treaty, the power could not ‘support the imposition upon citizens of duties or disabilities which otherwise would be outside the power of the Commonwealth’.

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101 Ibid 298.
102 (1951) 83 CLR 1.
103 Ibid 242 (Webb J).
104 Ibid 207 (McTiernan J).
106 Ibid 593 (Brennan CJ).
107 Ibid.
108 R v Burgess; Ex parte Henry (1936) 55 CLR 608, 674-5 (Dixon J); Commonwealth v Tasmania (1983) 158 CLR 1, 103 (Gibbs CJ), 232 (Brennan J), 260 (Deane J).
In relation to the incidental area of power, although conceding that the scope of the power was ‘wide’, Dixon J expressed doubt in *Australian Communist Party v Commonwealth*\(^1\) that it could be used to specifically and directly target ‘particular bodies or persons’ and ‘affect adversely their status, rights and liabilities once and for all’.\(^2\) Almost forty years later, Mason CJ, Deane and Gaudron JJ observed in *Davis v Commonwealth* that Parliament’s reliance on the incidental power to enact a statutory regime prohibiting the use of certain common words associated with the commemoration of the Bicentenary ‘reached too far’ and constituted an ‘extraordinary intrusion into freedom of expression’.\(^3\)

In connection with the aliens power, Gibbs CJ, with whom Mason and Wilson JJ agreed, cautioned in *Pochi v Macphee*\(^4\) that ‘Parliament cannot, simply by giving its own definition of “alien”, expand the power under s 51(xix) to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word.’\(^5\) Citing that passage in *Nolan v Minister for Immigration*\(^6\) and observing that the aliens power was not ‘at large’, Gaudron J expressed the view that Parliament could not simply expand the power ‘by constituting a non-alien an alien’,\(^7\) thus removing the rights of a citizen.

### iii. Relinquishing judicial power

Of all the concerns expressed regarding the open-ended nature of the so-called ‘purposive’ powers, perhaps the most elusive to pinpoint with precision is the concern that, in the absence of some form of constraint, the Court might surrender its supervisory role. Echoes of the concern can, however, be discerned in Dawson J’s discussion in *Richardson v Forestry Commission*\(^8\) of the treaty implementation aspect of the external affairs power. After observing that there was a tendency in the cases to focus on whether impugned legislation was giving effect to the

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\(^{1}\) (1951) 83 CLR 1.  
\(^{2}\) Ibid 192 (Dixon J).  
\(^{3}\) *Davis v Commonwealth* (1988) 166 CLR 79, 100.  
\(^{5}\) Ibid 109.  
\(^{6}\) (1988) 165 CLR 178.  
\(^{7}\) Ibid 192. See also, *Singh v Commonwealth* (2004) 222 CLR 322, 329 (Gleeson CJ); 381 (Gummow, Hayne and Heydon JJ) on this specific point.  
\(^{8}\) (1988) 164 CLR 261.
obligations imposed by the relevant treaty, Dawson J speculated that this stemmed ‘from a desire to find practical limits to the ambit of the external affairs power’.\textsuperscript{117} His Honour observed that without such limits the Court might be seen to have ‘relinquished in all but a theoretical sense the capacity to determine for itself the constitutional validity of legislation’.\textsuperscript{118} In other words, without constraining the exercise of an open-ended power like the treaty implementation aspect of the external affairs power, the Court would be allowing Parliament to decide for itself what the scope of its powers were. Justice Dawson concluded by observing that this might be the ‘inclination’ which explained why the external affairs power, like the defence power, had been deemed ‘purposive in nature’.\textsuperscript{119}

\textit{B. The role of ‘proportionality’ in characterisation}

Given the concerns regarding the open-ended nature of these powers, it is unsurprising to find that the Court might have been animated to locate means by which to constrain their use. For example, in \textit{Richardson v Forestry Commission}, Dawson J observed in relation to the external affairs power, that it would not be surprising ‘to find a search for some limit to the breadth which…the external affairs power apparently possesses.’\textsuperscript{120} In light of this, the role that the Court might have envisioned for proportionality with respect to the so-called ‘purposive’ powers begins to become apparent.

In 1992, Sir Anthony Mason, writing extra-curially, speculated that proportionality could be used as a ‘form of constraint’ on ‘the growth of central power’.\textsuperscript{121} His thoughts were echoed by HP Lee a couple of years later, who wrote that ‘the doctrine of reasonable proportionality becomes the main effective principle for the Court to impose some restraint on the exercise of the power.’\textsuperscript{122} These views were perhaps drawn from the indication given by Deane J in \textit{Richardson v Forestry Commission}\textsuperscript{123} that this was, indeed, the motivating purpose for referring to the

\begin{footnotesize}
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\item \textsuperscript{117} Ibid 325 (Dawson J).
\item \textsuperscript{118} Ibid.
\item \textsuperscript{119} Ibid.
\item \textsuperscript{120} Ibid 323 (Dawson J).
\item \textsuperscript{121} Sir Anthony Mason, ‘Foreward’ in HP Lee and George Winterton (eds), \textit{Australian Constitutional Perspectives} (Law Book Company, 1992) v, vi.
\item \textsuperscript{122} Lee, above n 73, 136.
\item \textsuperscript{123} Richardson v Forestry Commission (1988) 164 CLR 261.
\end{itemize}
\end{footnotesize}
‘reasonably appropriate and adapted’ and proportionality formulas. His Honour said in that case that the reasons for such tests had been explained by Dixon J in *R v Burgess*, namely that the nature of a ‘purposive’ power necessitated a ‘faithful pursuit of the purpose… before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth’.  

However, while there seems to have been a generally held view that reasonable proportionality might be employed as a means of constraint with respect to the ‘purposive’ powers, there appears to have been little consensus as to the precise analytical means by which this was to be achieved. As the Court pointed out recently in *Plaintiff S156*, proportionality has meant ‘different things about the effect of a law’ to different judges on the Court. Indeed, it is possible to discern at least three substantively different processes of reasoning in the cases on ‘purposive’ powers all employing concepts of proportionality or the ‘reasonably appropriate and adapted’ formula.

**C. The relationship with ‘reasonably appropriate and adapted’**

Before turning to examine these different processes of reasoning in detail, however, some consideration must be given to the relationship between ‘proportionality’ and the ‘reasonably appropriate and adapted’ formula, since both are referred to in the cases. The notion of a law being required to be ‘reasonably appropriate and adapted’ to a legitimate end was introduced into Australian constitutional law early in the Court’s history in *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association*. The case concerned the validity of certain provisions of the *Commonwealth Conciliation and Arbitration Act 1906* (Cth) as exercises of the implied incidental area of power connected with the conciliation and arbitration power in s 51(xxxv) of the Constitution. Justice Barton borrowed from the judgment in the seminal American case of *McCulloch v Maryland*, where Chief Justice Marshall had said:

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124 Ibid 312.
126 (1908) 6 CLR 309.
…we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. 127

Although the American Constitution requires that laws passed by Congress be ‘necessary and proper’, Barton J did not see this distinction as a limitation on his capacity to borrow Chief Justice Marshall’s language. And so, Barton J concluded that whether: (i) a law was seeking to achieve a ‘legitimate end’; and (ii) whether the means adopted by the law were ‘appropriate and plainly adapted to that end’ were questions for the High Court to answer in accordance with the ‘letter and spirit of the Constitution’. 128 Nonetheless, Barton J went on to draw a distinction between answering those questions and looking into whether a law is ‘wise and expedient’. He suggested that the latter kind of examination was ‘a political question’ and not for the courts. 129 Justice O’Connor also referred to Chief Justice Marshall’s famous passage in his judgment, 130 and framed the relevant questions for the Court in similar terms to Barton J. 131

The notion that, to be valid, a law needed to seek a legitimate end and be appropriate and adapted to that end was thereafter cited with relative frequency beyond the area of incidental powers and in relation to the defence 132 and the external affairs powers 133 too. However, it was not until 1983 that these ideas were expressly used in conjunction with proportionality. 134 In his famous judgment in Tasmania v Commonwealth, Deane J said:

127 (1819) 17 (US) 4 Wheat 316, 421, cited by Barton J in Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309, 344.
128 Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309, 345.
129 Ibid.
130 Ibid 357.
131 Ibid 358.
132 See, for example, Farey v Burvett (1916) 21 CLR 433, 443 (Griffith CJ).
133 See, for example, Airlines of New South Wales Pty Ltd v New South Wales [No. 2] (1965) 113 CLR 54, 86 (Barwick CJ).
134 Kirk, above n 9, 2: ‘Proportionality was introduced to Australian constitutional law as a distinct concept by Deane J in Commonwealth v Tasmania...’.
Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.135

Since then, there has been general agreement that there is some relationship between the ‘reasonably appropriate and adapted’ formula and proportionality. However, there is considerable variation in views on the precise nature of that relationship. In this respect, there appear to be at least four distinct positions. In *Cunliffe v Commonwealth*, Brennan J described proportionality as being ‘a condition of, if not a synonym for, the criterion of “appropriate and adapted”’.136

On the other hand, in *Tajjour v New South Wales*,137 French CJ conceived of the relationship in inverse terms, with ‘reasonably appropriate and adapted’ being a type of proportionality analysis. His Honour said that ‘reasonably appropriate and adapted’ is a species of the reasoning processes that can be described as falling within ‘the genus of proportionality tests’.138 A third view suggests that proportionality and ‘reasonably appropriate and adapted’ are indeed synonymous and can be used interchangeably to mean the same thing.139 In recent cases, for example, tests of validity have been framed by asking whether a law is ‘reasonably appropriate and adapted, or proportionate, to serve a legitimate end’.140 On the other hand, in what might be a fourth view, in *Plaintiff S156 v Minister for Immigration and Border Protection*,141 a full bench chided the plaintiff for suggesting that ‘reasonably appropriate and adapted’ and ‘proportionality’ could be referred to interchangeably. The Court said that to do so was to make ‘little more than

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137 (2014) 254 CLR 508.
statements of conclusion’ and that their use in this way could ‘mask more than reveal what is being said’. 142

What the above analysis makes clear is that there is no settled meaning of ‘proportionality’ or ‘reasonably appropriate and adapted’ in Australian constitutional law generally, let alone in the area of characterisation. It is, therefore, futile to try to define the nature of the connection between the two concepts or to attempt to bring clarity to one by reference to the other. For these reasons, this thesis will not dwell any longer on the distinction or similarity, if any, between the formulas. What is more important is to unpack the precise analytical or conceptual processes that these formulas are being used to deploy in the cases.

IV. VARIOUS USES OF ‘PROPORTIONALITY’ IN CHARACTERISATION

When attention is turned to uncovering the ways in which ‘proportionality’ and ‘reasonably appropriate and adapted’ have been used by the High Court in the process of characterisation, it is open to find that there are at least three distinct conceptual reasoning processes in connection with which these labels have been applied. Each of these has been used as a constraint on the exercise of legislative power under the so-called ‘purposive’ powers, but in different ways. They are explained and critically considered in the following section.

A. A test of sufficiency of connection

One means of constraint used by some members of the Court has been a requirement that there be a ‘close connection’ between the purpose of an impugned law and the head of power with respect to which it is purported to be made. This form of analysis focuses on whether there is a sufficiency of connection between the law and the power, and appears to have some similarity with that which is undertaken with respect of non-purposive powers. Jeremy Kirk has described it as ‘quantitative’ characterisation analysis, involving a ‘one-dimensional assessment

142 Ibid 43 [29] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
of the proximity of the law to a power’. An example of this kind of reasoning can be found in Dawson J’s judgment in *Nationwide News v Wills*:

> No doubt a law which is inappropriate or ill-adapted for the purpose of achieving a legitimate end may fail for want of a power. But it fails not because the Court considers the law to be inappropriate or ill adapted but because the very fact that the law is inappropriate or ill adapted prevents there being a sufficient connection between the law and a relevant head of power.

In the above judgment, Dawson J went on to disavow a role for proportionality, emphasising that the question was ‘essentially one of connection, not appropriateness or proportionality’. His Honour did not, however, explain how it was that a law could be considered ‘inappropriate’ to achieving a legitimate end if the Court was not concerned with appropriateness or proportionality. This inconsistency perhaps explains why judges who adopted similar lines of reasoning in later cases did not seek to distance themselves from notions of proportionality in the same way, but simply limited its meaning. Thus, in *Leask v Commonwealth*, McHugh J observed that ‘proportionality’ was ‘nothing more than a guide to sufficiency of connection’. It might be, at times, helpful in ‘determining whether the subject matter of the impugned law is sufficiently connected to the subject of federal power’ when the subject matter of the law ‘is not itself a head of federal power, but that law has ostensibly been passed to achieve some purpose falling within a subject of Commonwealth power’. Justice McHugh was referring here to the operation of the incidental power, and it is difficult to escape the elliptical nature of the reasoning along the lines discussed in Section II.C above. In particular, how are we to tell whether the purpose of a law falls within the subject matter of a head of power when the law is not made with respect to that subject matter?

Nonetheless, and although the effect appears to be relatively weak, it is arguable that this form of analysis generally has a constraining quality to it. Where a law is made with respect to the central area of a subject matter power, the law may be intended to achieve ‘some object unrelated’ to that subject matter and still be found

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143 Kirk, above n 9, 25.
144 *Nationwide News v Wills* (1992) 177 CLR 1, 88 (Dawson J).
146 Ibid.
valid. On the other hand, where there is a requirement that there be a ‘close connection’ or ‘proportionality’ between a purposive head of power and the purpose of a law, it is arguable that the law must be passed in pursuit of a much narrower set of purposes. This kind of constraining effect appears to describe the way that the defence power has been said to operate in times of peace. Exactly how the constraining effect would work with respect to the incidental area of power, however, is much harder to decipher due to the problems already discussed.

Further, it is arguable that using the notion of ‘proportionality’ as synonymous with the concept of a ‘close connection’ between a head of power and a law adds nothing to the analysis that the ordinary ‘sufficiency of connection’ test would not already require. Indeed, the only difference between the two types of analysis is that sufficiency of connection would be tested against a purpose rather than a subject matter (at least with respect to ‘purposive’ powers other than the incidental power). In both cases the basis of the analysis is rationality: is there a rational connection between a law’s practical or legal operation and either the purpose or the subject matter, as the case may be, of a head of power?

That proportionality does not here appear to be performing any special analytical function is a point that some members of the Court appear to have been alive to. Indeed, a majority of the Court (including, interestingly, McHugh J) in Victoria v Commonwealth described the use of proportionality in this way as not always ‘particularly helpful’ and as appearing to ‘restate the basic question’. It might be

148 Ibid.
149 Furey v Burvett (1916) 21 CLR 433, 442 (Griffith CJ): ‘the Court cannot shut its eyes to the fact that what could not rationally be regarded as a measure of defence in time of war may be obviously a measure of defence in time of war’; Richardson v Forestry Commission (1988) 164 CLR 261, 326 (Dawson J): ‘The purposive nature of the defence power, which differentiates it from other heads of power, including the external affairs power, makes it necessary to test the validity of a law passed in reliance upon it by reference to the purpose of the law rather than the subject-matter with which the law deals…It is necessary, because of the nature of that power, to look at what the legislation operates for, not what it operates upon… And because conditions may vary from war to peace, what is necessary or appropriate for the defence of the Commonwealth may alter from time to time, giving the defence power an ambit which expands and contracts according to external conditions’.
150 Jeremy Kirk has, however, argued that judges ‘may well be influenced, ‘even imperceptibly’, by qualitative considerations’. However, the highest that that argument can be put is that a judge ‘may be influenced by the particular qualitative nature of the matters in question’: Kirk, above n 9, 30 (emphasis original).
152 Ibid 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).
unsurprising, then, to learn that the popularity of this kind of analysis has waned considerably and has not been taken up by the Court for at least two decades.

B. A ‘smoking out’ device

A more searching form of analysis which has developed in the characterisation area under the nomenclature of ‘proportionality’ is directed at ‘smoking out’ unconstitutional purposes that might render a law potentially invalid. Under this approach, the Court asks whether there is a relationship of proportionality between the purpose of the law and the means used to achieve that purpose. The question is answered by looking to whether there are other ways of achieving the stated government purpose with less adverse effects than the law in question. The logic of the test is that, if there are other means of achieving the stated purpose which are more ‘narrowly tailored’, that is, with less adverse collateral effects, then there is a possibility that Parliament was seeking to pursue some illegitimate non-constitutional purpose. This possibility creates a rebuttable presumption that the law is invalid because it does not have a sufficient connection with the head of power with respect to which it was purported to have been made. As Dawson J observed in *Cunliffe*, ‘disproportion… may indicate that the means adopted are not the means of achieving an end within power but are in truth the means of achieving some end which lies outside power…’\(^{153}\) It is a form of reasoning with distinct similarities to the ‘least restrictive effect’ or ‘narrow tailoring’ doctrine in American jurisprudence.\(^{154}\) It is also arguable that it has antecedents in approaches to testing the validity of delegated legislation.\(^{155}\)

In the area of characterisation, this is arguably the most common form of reasoning associated with ‘proportionality’ and the ‘reasonably appropriate and adapted’


\(^{155}\) *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155 (Dixon J): …the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.
formula. We might take Deane J’s judgment in *Commonwealth v Tasmania*\(^{156}\) as an illustrative example:

Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be *a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.*\(^{157}\)

In giving effect to this test, Deane J looked to whether the law in question infringed on other rights or interests in the pursuit of its purported purpose:

Thus, to take an extravagant example, a law requiring that all sheep in Australian be slaughtered would not be sustainable as a law with respect to external affairs merely because Australia was a party to some international convention which required the taking of steps to safeguard against the spread of some obscure sheep disease which had been detected in sheep in a foreign country and which had not reached these shores. *The absence of any reasonable proportionality between the law and the purpose of discharging the obligation under the convention would preclude characterisation as a law with respect to external affairs notwithstanding that Tweedledee might, “contrariwise”, perceive logic in the proposition that the most effective way of preventing the spread of any disease among sheep would be the elimination of all sheep.*\(^{158}\)

In this hypothetical example, the pursuit of the convention’s objective by way of eliminating all sheep would be too broad a means of achieving the purported purpose of safeguarding against sheep disease: it would have the avoidable adverse effect of killing the sheep population. Implicit in the reasoning is the idea that a different kind of law (or means) would be needed – one more narrowly focused on achieving the aim of eliminating sheep disease *without* adverse impacts. However, the aim of the test was not to qualitatively evaluate the adverse impacts and decide validity of the power directly by reference to those impacts. Rather, it was focused on checking the connection between the impugned law and the head of power. Only in the absence of avoidable adverse impacts could a law been seen, Deane J reasoned, ‘with “reasonable clearness”, upon consideration of its operation, to be

\(^{156}\) *Commonwealth v Tasmania* (1983) 158 CLR 1.

\(^{157}\) *Ibid* 260 (Deane J) (emphasis added).

\(^{158}\) *Ibid.*
“really, and not fancifully, colourably, or ostensibly, referable” to and explicable by the purpose or object which is said to provide its character’.\(^{159}\)

In the above analysis, some gaps have been filled in Deane J’s reasoning in order to make sense of his passage in *Tasmania v Commonwealth*. We can see, however, that this was exactly the kind of analytical process that his Honour had in mind when we look to his extended explanation in the later case of *Richardson v Forestry Commission*.\(^{160}\) There his Honour said:

Ordinarily, that process of characterization will involve no more than consideration of the law’s objective legal operation without regard to any ulterior legislative purpose or object. There are, however, circumstances in which characterization of a law requires that regard be paid to any such purpose or object.\(^{161}\)

His Honour went on to identify the incidental power, the defence power and the external affairs power as areas in which the identification of an ulterior purpose might be relevant. He continued:

While the question of what is the appropriate method of achieving a desired result is a matter for the Parliament and not for the court, the operation of a law will not properly be seen as explained by the designated purpose or object unless it appears that that operation is capable of being considered to be appropriate and adapted to achieve it. Such a law will not be capable of being so seen unless it appears that there is “reasonable proportionality” between that purpose or object and the means which the law adopts to pursue it.\(^{162}\)

This kind of reasoning can also be found in the plurality judgment in *Davis v Commonwealth*.\(^{163}\) In *Davis*, the Court was concerned with the validity of regulations which proscribed the use of everyday words such as ‘200 years’ and ‘Australia’ in conjunction with the years ‘1788’, ‘1888’ or ‘88’, purportedly for the purpose of protecting the commemoration of the Bicentenary. Mason CJ, Deane and Gaudron JJ, with whom Toohey J concurred on this point, took the view that the laws provided for a regime which was ‘grossly disproportionate to the need to protect the commemoration’.\(^{164}\) The basis for this conclusion was that the laws

\(^{159}\) Ibid 260-1 (Deane J)

\(^{160}\) (1988) 164 CLR 261.

\(^{161}\) Ibid 308.


\(^{163}\) (1988) 166 CLR 79.

\(^{164}\) Ibid 100 (Mason CJ, Deane and Gaudron JJ).
reached ‘far beyond the legitimate objects sought to be achieved’ and in doing so constituted an ‘extraordinary intrusion into freedom of expression’.\textsuperscript{165} For the plurality, that intrusion meant that the laws could not be considered ‘reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power’.\textsuperscript{166} Indeed, this lack of proportionality between means and ends suggested that the laws were ‘directed not to the commemoration of the Bicentenary as such but to the attainment of objects lying beyond the commemoration itself’.\textsuperscript{167}

In \textit{Nationwide News}, the Court was concerned with the validity of a provision of the \textit{Industrial Relations Act 1988} (Cth) which made it an offence to write or speak words ‘calculated… to bring a member of the (Industrial Relations) Commission or the Commission into disrepute’.\textsuperscript{168} Chief Justice Mason observed that ‘in characterizing a law as one with respect to a permitted head of power, a reasonable proportionality must exist between the designated object or purpose and the means selected by the law for achieving that object or purpose’.\textsuperscript{169} For Mason CJ, in order to determine the question of proportionality it was material to ascertain whether there were ‘adverse consequences’ caused by the law which resulted in ‘any infringement of fundamental values traditionally protected by the common law, such as freedom of expression’.\textsuperscript{170} Similarly, Gaudron J observed that:

\ldots it is often convenient to ask a question or questions which, if answered in the affirmative, will indicate that [a law] has the particular purpose in issue. For example, it may be asked whether the provision has been “found necessary”; whether it involves something that may reasonably and properly be done to effectuate the specified purpose, whether “the means adopted are appropriate” or whether it is “reasonably considered to be appropriate and adapted” to achieving that purpose. The last question has a dual function in that, if the provision is not reasonably capable of being viewed as appropriate and adapted, it can be taken that it does not have the particular purpose in issue, but some other and different purpose.\textsuperscript{171}

\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid 98 (Mason CJ, Deane and Gaudron JJ).
\textsuperscript{168} Section 299(1)(d)(ii) of the \textit{Industrial Relations Act 1988} (Cth).
\textsuperscript{169} \textit{Nationwide News v Wills} (1992) 177 CLR 1, 29 (Mason CJ).
\textsuperscript{170} Ibid 31 (Mason CJ).
\textsuperscript{171} Ibid 93-4 (Gaudron J).
A parallel line of reasoning can be located in Mason CJ’s judgment in *Cunliffe*. In that case, Mason CJ described ‘reasonable proportionality’ as inquiring as to whether the impugned provision ‘is capable of being reasonably considered to be appropriate and adapted to the end in view.’ He referred to this as being an inquiry as to whether there had been a ‘faithful pursuit of purpose’ in the sense that there is a ‘proportionality’ between the object of the law and the means selected for achieving that purpose’. To answer that question, it was relevant to see whether the law caused adverse consequences, including ‘infringement of fundamental values’ in order to ‘ensure that such a law does not unnecessarily or disproportionately regulate matters beyond power under the guise of protecting or enhancing the legitimate end in view.’

C. A mechanism for balancing

Although a much rarer form of analysis, the third way in which proportionality has been used in characterisation is in a more evaluative way by conducting a balancing between the importance of the end being pursued by the law and the nature and degree of the impact that that pursuit has on other rights and interests. There is a close connection between this kind of reasoning and the ‘smoking out’ reasoning described above, and reference to both forms under the umbrella term of ‘proportionality’ allows a slippery slide from one into the other that can sometimes be difficult to pinpoint with precision. However, there is a key distinction which allows us to distinguish between the two forms of reasoning. ‘Smoking out’ is, ultimately, concerned with uncovering an unconstitutional legislative purpose. In that sense, it is not concerned with qualitative assessments of adverse impacts except to the extent that the more egregious the adverse effect the more it lends support to the view that the law was seeking to achieve an unconstitutional purpose. On the other hand, this third type of reasoning is directly concerned with qualitatively evaluating the benefits of a law against the costs that it imposes. In other words, it is looking for whether the law is justified not whether it lacks a

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173 Ibid.
174 Ibid.
connection to a head of power. Under this form of analysis, an unjustifiable cost on other rights or interests is sufficient to render the law invalid.

This form of reasoning is perhaps best exemplified in Brennan J’s judgment in *Davis v Commonwealth*. In that case, his Honour directly evaluated the cost that the impugned provisions imposed on ‘freedom of speech’ against the purpose the legislature was seeking to achieve in prohibiting the use of certain words (commemoration of the bicentenary). Relevantly, his Honour said:

> Freedom of speech may sometimes be a casualty of a law of the Commonwealth made under a specific head of legislative power – e.g., wartime censorship – or of a law designed to protect the nation – e.g., a law against seditious utterances – but freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive to advance a nation which boasts of its freedom.

There is simply no other way to read the passage above other than to acknowledge that Brennan J was conducting an evaluative exercise, and ultimately that his Honour decided that the cost imposed on freedom of speech was not justified by the purpose (commemoration) being pursued by executive and legislative acts. His Honour went on to find that the impugned provisions were invalid.

It ought to be borne in mind that *Davis* was decided before the freedom of political communication was recognised as implied in the Constitution. If Brennan J’s analysis had been conducted later and on the basis of the implied freedom, then arguably far fewer concerns might be have been raised. But as it stood, Brennan J was balancing what at most could be described at the time as a common law right (freedom of expression) against an exercise of power that would have otherwise had constitutional authority. As a consequence, three distinct objections have been held against this form of reasoning.

The first objection relates to the use of this kind of reasoning to elevate extra-constitutional rights and interests to a ‘constitutional’ status. Such elevation sits

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175 (1988) 166 CLR 79.
177 See discussion in Chapter 8 of this thesis.
178 Ironically, it was Brennan J in *Nationwide News v Wills* who pointed to the problems with this kind of approach for the legitimacy of judicial review. In that case, his Honour said: ‘the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political
uncomfortably with other broadly accepted constitutional principles. While the Constitution’s common law origins have long been acknowledged and it is not disputed that the common law continues to play a significant role in constitutional interpretation, High Court authority has repeatedly asserted a distinct hierarchy between these constitutional and common law sources of law. For example, in *Theophanous*, Mason CJ, Toohey and Gaudron JJ observed that if ‘the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former’. Similarly, in *Lange v Australian Broadcasting Corporation*, the full Court concluded that ‘[o]f necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives’. These observations of the Court have led to the generally accepted conclusion that ‘if an express or implied provision of the Constitution is inconsistent with an existing common law rule, the latter must, of course give way.’

The second objection is that, even if we were to accept that there could be justification for constitutionalising some common law rights, it would be difficult

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180 Cheattle v The Queen (1993) 177 CLR 541, 552: ‘it is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law’s history’; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 141 (Brennan J). See also, Dixon, above n 179, 212-3; Zines, *High Court*, above n 44, 567-8.


183 Zines, *High Court*, above n 44, 569. See also, William Gummow’s observation that the ‘High Court has not embraced any general theory for the implication of restraints upon the legislative powers of the Commonwealth by notions of the supremacy of the common law or a distillation of its judicially attractive fundamentals’: William Gummow, ‘The Constitution: Ultimate foundation of Australian law?’ 79 *Australian Law Journal* 167, 177. Similarly, Leslie Zines has observed that ‘some judges have suggested that common law rights might directly limit the legislative and executive power of the Commonwealth Parliament and, perhaps, State Parliaments. That view has not been followed’: Zines, *High Court*, above n 44, 569. There is, however, here an important distinction between common law rights and interests and implied constitutional rights. For example. George Winterton has distinguished between rights implied from constitutional text (e.g. freedom of political communication) and structure (e.g. rights emanating from the strict separation of Chapter III judicial power), on one hand, from ‘common law rights’ applied as prohibitions or limitations on legislative and executive power, on the other. He described the former as having ‘much firmer constitutional foundations’ than the latter: George Winterton, ‘Constitutionally Entrenched Common Law Rights’ in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 121, 122-3, 126.
to identify precisely which ones. Some, like Murphy J, have advocated for a long list of such rights. His Honour’s list included from time to time ‘freedom of speech, assembly, communication and travel throughout the Commonwealth, freedom from slavery, serfdom, civil conscription, cruel and unusual punishment, arbitrary discrimination on the ground of sex, and freedom for fully competent adults from subjection to the guardianship of others (ie self-determination’.

Although others, such as Mason CJ in Nationwide News and Cunliffe and Brennan J in Polyukhovich have taken a more restrained approach, they have nonetheless considered that the list ought to be broad enough include free speech, association and exercise of religion as well as rights to property. Others still have harboured greater reservations about developing a precise catalogue of ‘fundamental’ common law rights worthy of constitutionalisation. For example, Gummow J has observed extrajudicially that ‘no means of distinction is offered between the “bad” elements in the common law, and those “good” elements which are to be constitutionally entrenched’.

Similarly, Leslie Zines has noted that the question of which common law rights would be considered sufficiently ‘fundamental’ to warrant limiting constitutional powers ‘would depend on the values of the judges or their view of community values’. In effect, the power to decide such matters would represent a transfer of power away from representative institutions and towards the judiciary, against the intentions of the framers of the Constitution.

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184 Winterton, above n 183, 143.
185 Ibid 129.
186 Nationwide News v Wills (1992) 177 CLR 1, 31 (Mason CJ); Cunliffe v Commonwealth (1994) 182 CLR 272, 297 (Mason CJ).
190 Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 Sydney Law Review 166, 181-2. Zines was particularly critical of the approach taken by Deane and Toohey JJ in Leeth v Commonwealth (1992) 174 CLR 455 and what he saw as their attempt to constitutionalise a common law doctrine of legal equality and use it as a limitation on federal legislative power, at 485-7. Zines observed that to ‘limit government power by reference to fundamental principles of the common law has, at best, a tenuous link with anything in the Constitution’: at 183.
The third objection raises the concern that it is difficult to assess the normative weight to be assigned to common law rights and interests ‘at large’. This in turn leads to problems identifying the ‘cost’ of legislative incursions into these rights or interests, there is ‘no way of quantifying the negative weight to be allocated to the means’ adopted by an impugned law. Any judicial determination of relative ‘cost’ in the absence of a grounding in the Constitution itself would undoubtedly raise legitimacy and competency concerns on an even greater scale than those considered in Chapter 4 of this thesis.

V. EXPLAINING PROPORTIONALITY IN CHARACTERISATION

A. Reactions to the use of proportionality in characterisation

The objections considered above have led to two distinct responses from members of the High Court in relation to proportionality analysis in characterisation. The first has been to suggest that proportionality analysis is an inappropriate analytical method in Australian constitutional law generally. In *Leask v Commonwealth*, for example, McHugh J cautioned that if proportionality became a ‘general touchstone’ of constitutional power, then the Court ‘would be drawn inexorably into areas of policy and of value judgments’. In *New South Wales v Commonwealth* (‘Work Choices case’), a majority of the High Court affirmed comments made in *Leask* that ‘if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.’ And in *Cunliffe v Commonwealth*, Dawson J suggested that where, as in this country, fundamental freedoms do not, for the most part, take the form of constitutional guarantees, the doctrine of proportionality finds no ready application as it does in Europe. His Honour also cautioned that proportionality ‘invites the court to have

191 Kirk, above n 9, 26.
193 Ibid 615-6.
194 (2006) 229 CLR 1, [142].
197 Ibid 356.
regard to the merits of the law – to matters of justice, fairness, morality and propriety – which are matters for the legislature and not for the court."^{198}

The second response has been to re-formulate the terms of the analysis such that it proceeds at a high level of deference to legislative choice. In *Tasmanian Dams*, for example, Deane J suggested that to be valid, a law ‘must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs’.^{199} The italicised words in this passage were added to the traditional ‘reasonably appropriate and adapted’ formula as a mark of heightened deference in this area. That view was consolidated by Brennan CJ in *Cunliffe*, where his Honour considered it ‘essential that this Court, in applying the test of proportionality, allows to the Parliament what the European Court of Human Rights calls “a margin of appreciation” in choosing the means which are appropriate and adapted to that purpose or object’.^{200}

**B. Is ‘proportionality’ an appropriate analytical tool?**

Applying the theoretical model developed in Part I of this thesis assists in explaining why it is that neither of the courses suggested above is an appropriate response to problems raised by proportionality in this area. We might begin by considering the balancing form of ‘proportionality’ used by Brennan J in *Davis*. In Chapters 3 and 5 of this thesis, it was theorised that evaluative forms of analysis – including structured proportionality and unstructured balancing – are appropriate analytical tools in contexts where a ‘balancing problem’ arises. The key characteristics of that problem include: (1) the existence of a set of rights or interests in conflict; (2) each of which exists on the same *prima facie* normative plane; (3) neither of which operates absolutely; and (4) at least one of which cannot be defined in the abstract. In the characterisation context, however, the balancing problem does not arise because condition (2) is not satisfied. On the one hand, there may be an

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198 Ibid 357.
199 *Commonwealth v Tasmania* (1983) 158 CLR 1, 259 (Deane J) (emphasis added). A similar formulation was used by Deane J in *Richardson v Forestry Commission* (1988) 164 CLR 261, 311: ‘…the operation of a law will not properly be seen as explained by the designated purpose or object unless it appears that that operation is *capable of being reasonably considered* to be appropriate and adapted to achieve it’ (emphasis added).
200 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 325. See also, Selway, above n 54, 217.
exercise of legislative power which has constitutional force by virtue of s 51, and on the other hand there may at best be a general concern for a common law right or interest with no constitutional status. To balance these two interests against each other raises concerns regarding the courts exceeding their supervisory role, such as through the ‘constitutionalisation’ of unconstitutional rights and interests discussed in Section IV above. It is therefore inappropriate to use an evaluative form of proportionality – such as that adopted by Brennan J in *Davis* – in the context of characterisation in the absence of a ‘balancing problem’.201

Fixing a high degree of judicial deference, such as by the application of the formula suggested by Deane J in *Tasmanian Dams*, cannot cure this fundamental mismatch. As we have seen in respect of the formalist and restrictive institutional approaches to judicial restraint discussed in Chapter 4, if such restraint is applied in a categorical way it is likely to lead to a significant underinclusiveness in the operation of the judicial supervisory function. For example, by asking whether a law is ‘reasonably capable of being seen to be appropriate and adapted to a legitimate end’, the High Court risks applying a formula that is so weak that it in effect amounts to an abdication of the judicial function.202

Less objection can be raised to the use of the other two analytical methods which have been described as ‘proportionality’ in this context: sufficiency of connection and ‘smoking out’ unconstitutional purposes. Both of these forms of analysis may aid the process of characterisation. Sufficiency of connection involves applying a basic rationality test: is there a logical connection between the operation or effect of the law and the head of power on which it relies? ‘Smoking out’ involves attempting to uncover an unconstitutional purpose by identifying avoidable adverse effects caused by the law. In relation to both, the non-specific language of a general concept of proportionality might be invoked to aid analysis. For example, under sufficiency of connection we might say that there is a ‘connection’ or ‘proportionate relationship’ between a law and a power. Under ‘smoking out’ we might say that

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201 It should be noted that the position is quite different with respect to Brennan J’s approach to the implied freedom of political communication, as discussed in Chapter 8. See also, Dan Meagher, ‘The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference’ (2011) 30 University of Queensland Law Journal 119.

202 See discussion in Chapter 4, Section III above regarding abdication.
there is a proportionate relationship between the means adopted and the end sought to be achieved. Furthermore, in both cases there is analytical similarity to a sub-test of structured proportionality analysis. Sufficiency of connection – being a rationality test – operates similarly to the suitability stage of structured proportionality, and ‘smoking out’ operates similarly to the necessity stage.

However, while there may be no objection to either of these forms of analysis being used in the characterisation process, an objection may be raised to their being referred to as forms of ‘proportionality’ analysis. This is because proportionality analysis has in the last two decades come to have a fairly settled meaning in the international literature. This meaning suggests an evaluative type of analysis involving a balancing of competing rights and interests against each other, and usually taking place in the structured form discussed in Chapter 3. Describing sufficiency of connection and ‘smoking out’ as forms of ‘proportionality’ is therefore liable to confuse on two fronts. First, it could mask the specific form of analysis that is actually undertaken in each of these types of tests, and the reasons why. As we have seen, these are legitimate forms of analysis and their form and function should not be hidden under the general label of ‘proportionality’. Second, and perhaps more troublingly, it might allow the analysis to inadvertently slide into a more evaluative form in a context where this would appear to be inappropriate and likely raise significant concerns regarding judicial legitimacy.

This is not, however, to say that proportionality has no role to play in Australian constitutional law altogether, as suggested by McHugh J in *Leask*. As shall be seen in Chapter 8, proportionality analysis in a structured form is an entirely appropriate tool in contexts where a ‘balancing problem’ arises. This much was hinted at by Toohey J in in *Leask*, where his Honour suggested that the use of proportionality ought to be confined to instances where there is a tension between two operative principles, such as an exercise of power under s 51 and an implied or express right.

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VI. CONCLUSION

The use of proportionality in characterisation has generated significant confusion and misunderstanding. There is a widely held assumption that proportionality only has a role to play with respect to the so-called ‘purposive’ powers. However, the ‘purposive’ powers do not share a common characteristic of being inherently ‘purposive’. Rather, what they do appear to share in common is an inherently open-ended nature. This nature has given rise to judicial concerns regarding the use of these powers by the legislature in ways that affect the federal structure established by the Constitution and the rights and interests of individuals. Proportionality has generally been viewed as a means by which the use of such powers might be constrained.

There are at least three different types of analysis that have each been described as ‘proportionality’ and used as a constraining vehicle in this context: sufficiency of connection; ‘smoking out’ of unconstitutional purposes; and a more evaluative balancing form of analysis that compares the importance of the law’s purpose against the incursion into general rights and freedoms. The theoretical model developed in Part I of this thesis explains why it is that the use of an evaluative, balancing form of analysis is not appropriate in the context of characterisation. In the absence of a ‘balancing problem’ of the type described in Chapter 3 of this thesis, an evaluative form of proportionality analysis may lead to the constitutionalisation of extra-constitutional interests, and thus raise significant concerns regarding the judiciary exceeding its supervisory role.

On the other hand, the sufficiency of connection and ‘smoking out’ forms of analysis have an important and legitimate role to play in the characterisation process. However, given their significant conceptual differences, these analytical tools should not be referred to as ‘proportionality’ for this is likely to confuse and potentially lead to the inadvertent application of a more evaluative, and therefore inappropriate, form of analysis.
PROPORTIONALITY AND THE FREEDOM OF INTERSTATE TRADE AND COMMERCE

I. INTRODUCTION

The previous chapter examined proportionality analysis in connection with characterisation of laws in respect of constitutional heads of power. In this chapter, the focus turns to another area of Australian constitutional law with which proportionality has been associated: jurisprudence relating to the interstate trade and commerce arm of s 92 of the Constitution.¹ Unlike characterisation, this area of law is not concerned with the operation of empowering provisions but rather an express constitutional limit on legislative power.

The relevant part of s 92 is contained in its first line, and provides:

On the imposition of uniform duties of customs, trade, commerce and intercourse amongst the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The guarantee of ‘absolutely free’ interstate trade and commerce contained in the above passage has given rise to a vast volume of litigation in the High Court.² As the Court itself has observed, ‘[n]o provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s. 92.’³ Commentators have quipped that the provision has ‘driven usually composed judges to the depths of despair, and usually sedate commentators to paroxysm of

¹ This chapter does not consider the intercourse limb of s 92 jurisprudence. The High Court has indicated that the latter is a separate strand of doctrine governed by different principles: Cole v Whitfield (1988) 165 CLR 360, 388; APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322. It is also an area in which proportionality appears to have no direct application.
² Leslie Zines, The High Court and the Constitution (Federation Press, 5th ed, 2008) 139.
purple prose’. Despite significant jurisprudential developments in recent times, particularly in the wake of the landmark case of Cole v Whitfield, observers have continued to describe the section as ‘partially uncharted territory’.

The primary reason for the proliferation of litigation surrounding s 92 is the ‘broad and general’ terms in which its operative part is expressed; most significantly, the indeterminate meaning of the words ‘absolutely free’. In the absence of textual guidance, the key question has always been: ‘absolutely free from what?’ Is the provision a guarantee of freedom from interstate border customs and tariffs (‘fiscal burdens’) only, does it provide freedom from interstate protectionism which confers a market advantage, or is it a freedom from all forms of regulation of trade, commerce and intercourse whatsoever?

The most prominent approaches to interpreting the section as they had developed prior to Cole v Whitfield were extensively mapped by Michael Coper in the 1980s. As Coper observed, each of these theories attempted to resolve the key question described above in its own way. What emerges from an examination of these theories is that there sits beneath s 92 an inescapable tension between the desire for national unity or a ‘common market’, on one hand, and the autonomy of the States in regulating their internal affairs, on the other. Each theory has come to a different conclusion on the overarching issue of how to strike a balance between these competing interests.

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4 Michael Coper, Freedom of Interstate Trade under the Australian Constitution (Butterworths, 1983), iii.
9 Justice Kiefel has phrased the question in the following way: ‘...it has never been accepted that trade and commerce can be absolutely free of regulation. But when is regulation, which has the anti-competitive effects spoken of, permissible? What legislative aims might be acceptable? How far can the legislation intrude into the sphere of protection given by s 92 in pursuit of that objective?’: Susan Kiefel, ‘Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives’ (2010) 36 Monash University Law Review 1, 8.
10 Coper, Interstate Trade, above n 4; Leslie Zines, The High Court and the Constitution (Butterworths, 2nd ed, 1987).
11 Zines, above n 2, 139.
In an attempt to cut through the confusion generated by the competing approaches, the High Court established a new test in *Cole v Whitfield*: laws would be invalidated by s 92 if they sought to impose a ‘discriminatory burden of a protectionist kind’. The approach has generally been lauded as ‘absolutely right’. Notwithstanding this praise, however, the test ushered in a new debate on both interpretation and method. Some commentators have argued that, post-*Cole v Whitfield*, the relevant ‘touchstone’ for identifying discriminatory burdens of a protectionist kind is locating improper legislative purpose, while others have suggested that the Court needs to engage in structured proportionality analysis to resolve the issue.

The aim of this chapter is to engage with this debate in light of the theoretical framework developed in Part I of this thesis. In service of this aim, the chapter begins in Section II by briefly surveying the doctrine prior to *Cole v Whitfield* and tracing key themes. In Section III, it discusses the jurisprudence as it developed from *Cole v Whitfield* onwards, with particular attention given to developments in judicial method. Finally, Section IV engages with the competing modern approaches to s 92, including improper legislative purpose and structured proportionality. In light of the theoretical framework developed in Part I, it considers whether these competing approaches can provide a satisfactory account of the current jurisprudence or suggest a compelling way forward.

II. THEORIES OF SECTION 92 BEFORE COLE V WHITFIELD

Prior to the decision in *Cole v Whitfield*, much academic and judicial attention had been directed towards engaging with the competing theories of s 92 which had emerged since Australia’s Federation. Four key theories were prominent: the Dixonian individual rights theory, Barwick CJ’s ‘modified’ individual rights

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12 *Cole v Whitfield* (1988) 165 CLR 360, 394, 398 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). The Court also employed other phrases such as ‘discriminatory burdens having protectionist purpose or effect’, ‘discrimination of a protectionist character’ and ‘discriminatory protectionism’: at 404, 407, 408 respectively.


15 Simpson, above n 6.

theory, the free trade approach and the fiscal burdens theory. After decades of confusion, the competition for dominance between these theories was consigned to history by the unanimous decision in *Cole v Whitfield*, which gave distinct preference to only one. Nonetheless, it is useful to briefly examine the vision that each theory had for what was meant by the phrase ‘absolutely free’. Appreciating these competing perspectives sets the scene for understanding why there is a contemporary debate over the operation of s 92.

A. The individual rights approach

The individual rights approach, perhaps the most dominant theory for much of the 20th century, considered the s 92 guarantee as principally concerned with preserving the right of an individual to trade across State borders without interference. As such, the theory characterised the freedom embodied in s 92 in extremely broad terms.17 One version of the individual rights approach, the formalistic ‘criterion of operation’ formula,18 gained traction in various judgments of Sir Owen Dixon from the 1930s to 50s.19 That formula sought to draw a bright-line distinction between regulations that directly targeted interstate trade and therefore fell within the coverage of s 92, and those validly outside its scope for having only indirect effects.20 Thus, within its scope of operation, s 92 was viewed as an absolute trump

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17 This claim must be qualified. As Michael Coper has explained, the original version of this formula (set down in *O. Gilpin Ltd v Commissioner for Road Transport and Tramways* (NSW) (1935) 52 CLR 189, 205-6) was drafted in abstract terms that envisioned a broad scope for the freedom. By the time the formula had gained traction and become orthodoxy in the 1950s, the abstract formula had to be applied by the Court to specific factual circumstances. In this process of applying the abstract to the concrete, an eventual narrowing of the doctrine occurred in its application. Nonetheless, this narrowing does not detract from the formula’s theoretical beginnings as conceiving of the s 92 freedom as protective of the individual and therefore necessarily broad. See further, Coper, *Interstate Trade*, above n 4, 177-8.
18 *Cole v Whitfield* (1988) 165 CLR 360, 384 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ): ‘…it was concerned only with the formal structure of an impugned law and ignored its real or substantive effect’. Note, however, that Michael Coper has asserted that the version of the criterion of operation doctrine that settled after *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, ‘should not, and could not, be regarded as requiring no more than an inspection of the terms of legislation’: Coper, *Interstate Trade*, above n 4, 126.
19 *O. Gilpin Ltd v Commissioner for Road Transport and Tramways* (NSW) (1935) 52 CLR 189, 205-6 (Dixon J); *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 17-8 (Dixon CJ); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 78 (Dixon CJ); *Mansell v Beck* (1956) 95 CLR 550, 564-5 (Dixon CJ).
20 Under the criterion of operation, a law was held inapplicable if it took ‘a fact or an event or a thing itself forming part of trade commerce or intercourse, or forming an essential attribute of that conception’ and proceeded to ‘impose a restriction, burden or a liability’ on it which constituted ‘a real prejudice to interstate transactions’: *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1, 17 (Dixon CJ). Anything ‘inessential, incidental or, indeed, antecedent or preparatory to that trade and commerce’ was not within the coverage of s 92: *Cole v Whitfield* (1988) 165 CLR 360, 401.
over any competing interests embodied in legislation that intruded within the sphere of the freedom. That is, both the overall ‘coverage’ of the s 92 freedom, which was broad, and the area of its absolute operation occupied a coextensive space.

From the perspective of hindsight, we can now say that the attempt by Dixon J, and later the Dixon Court, to characterise the s 92 guarantee in both broad and absolute terms was doomed to fail from the outset. The problems attendant in attempting to apply such a formula to diverse factual circumstances were numerous. It led to a narrowing of the doctrine in its application and the emergence of a number of exceptions that eroded its claim to being a black and white ‘inclusive and exclusive touchstone of validity’.\(^2\)

The first of those exceptions was alluded to by the Privy Council in *Commonwealth v Bank of New South Wales & Ors\(^2\)\(^2\)\) In that case, the Council endorsed the individual rights approach to s 92, concluding that ‘a law which is directed against inter-State trade and commerce is invalid.’\(^3\) Nonetheless, their Lordships were forced to acknowledge that there would be exceptions to a total proscription of trade regulation, such as when a law ‘prescribes rules as to the manner in which trade (including transport) is to be conducted’ and is ‘not a mere prohibition’.\(^4\) Even when a regulation did take on the character of a ‘prohibition’, the Council conceded that there still might be some opportunity to save validity, such as when it was the ‘only practical and reasonable manner of regulation’.\(^5\)

The second exception emerged within the Dixon Court’s doctrine itself, with Michael Coper describing it as the ‘Dixon dodge’.\(^6\) The Court explained that where regulations used ‘circuitous’ or ‘devious’ methods of achieving indirect effects on interstate trade, they would be deemed to be operating directly and therefore be invalid.\(^7\) The need to apply this exception did not arise in cases that came before the Dixon Court, but nonetheless it was ‘kept in reserve, as escape-hatches typically

\(^2\) Coper, *Interstate Trade*, above n 4, 177.
\(^2\)\(^2\) (1949) 79 CLR 497; [1950] AC 235 (the ‘Bank Nationalisation Case’).
\(^3\) Ibid 640.
\(^4\) Ibid.
\(^5\) Ibid 640-1.
\(^7\) Wragg v New South Wales (1953) 88 CLR 353, 399 (Dixon CJ); Mansell v Beck (1956) 95 CLR 550, 565
are, ready to be called upon in any case in which the rule produced too uncomfortable a conclusion’.

The third exception involved an evolution in the concept of ‘regulation’, which the doctrine recognised as ‘saved’ from invalidity even when it had a direct effect on interstate trade and commerce. Most of the time the Court avoided this exception, preferring to decide cases on the basis of the concept of directness. Nonetheless, on occasion it was forced to deal with it, and in those cases to define what ‘regulation’ meant in this context. Kitto J’s articulation was perhaps the clearest of those attempts, providing that the s 92 freedom could be circumscribed ‘in the interests of an orderly society’.

What is apparent from the above discussion is that Dixon J’s interpretation of s 92’s coverage was patently overbroad and thus, in the long run, unworkable. Its lack of accommodation of necessary government regulation led, ultimately, to the need to find myriad exceptions. These exceptions jarred with the underlying rationale for the approach and undermined the theory’s vision of s 92 as an absolute limitation. In this light, it is unsurprising that the Dixonian approach eventually had to give way to a conception of the freedom grounded in a more defensible rationale.

**B. Barwick’s modified individual rights theory**

In the latter half of the 20th century, Sir Garfield Barwick advocated a slightly modified version of the individual rights approach. For Barwick CJ, *any* regulation of interstate trade and commerce, irrespective of the motive behind it, could fall foul of the constitutional guarantee and be invalidated. Thus, the Chief Justice asserted that the starting point for analysis was the view that ‘[t]here can be no warrant whatever for this Court to qualify or limit the freedom which the Constitution guarantees. It is at least absolute in that sense: it is unqualified’.

Nonetheless, there was an exception to even this near-absolute view of the freedom. The Chief Justice explained this exception in the following terms:

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29 *Hughes and Vale* [No.2] (1955) 93 CLR 127, 217-9 (Kitto J).
30 Permewa Wright Consolidated Pty Ltd v Trewhitt (1979) 145 CLR 1, 10 (Barwick CJ).
The concept of freedom and the word “free” carry within themselves their own limitation. Perhaps the analogy of freedom of speech cannot be bettered. A man enjoys freedom of speech though he may not defame his fellows. The relationship of one man to another in a civilized society furnishes the basis for the conclusion that inability to defame without consequence is not an impairment of freedom, properly understood. The freedom of the individual to engage in interstate trade and commerce is included in the freedom of interstate trade and commerce which the Constitution guarantees. Thus laws to ensure public health and honesty and fairness in commercial dealings form examples of laws which the concept of freedom of trade and commerce does not deny.31

Thus, Barwick CJ considered that there were ‘inherent restraints’32 built into s 92 such that laws that were themselves aimed at enhancing the ‘freedom of the individual to engage in interstate trade and commerce’ might be valid if found ‘reasonably necessary’.33 A law would only be reasonably necessary if it was ‘for the mutual accommodation of the activities of interstate traders’.34 In this sense, Barwick CJ’s approach sought to define the scope of s 92’s operation more narrowly than the Dixonian version of the theory. However, in common with its Dixonian cousin, Barwick CJ’s modified approach considered that within the field of its operation, s 92 operated absolutely.

C. Free trade theory

An approach that vigorously competed with both the Dixonian criterion of operation formula and the Barwick modified individual rights approach was the free trade theory. The theory was first put forward by Evatt J in dissent in *Peanut Board v Rockhampton Harbour Board*.35 Under this approach, it was the concept of free trade throughout the Commonwealth, rather than an individual freedom from regulation, which was emphasised.36 The theory took a narrower view of the scope of operation of s 92 than the two individual rights theories described above.

31 North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW (1975) 134 CLR 559, 581 (Barwick CJ). See also Samuels v Readers’ Digest Association Pty Ltd (1969) 120 CLR 1, 14-18; SOS (Mowbray) Pty Ltd v Mead (1972) 124 CLR 529, 543-552; Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 145 CLR 1, 9-12.
32 Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 145 CLR 1, 10 (Barwick CJ).
33 North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW (1975) 134 CLR 559, 581 (Barwick CJ).
34 Coper, *Interstate Trade*, above n 4, 262.
35 (1933) 48 CLR 266.
Consequentially, a broader conception of permissible interstate trade regulation was adopted. That is, a piece of regulation would not constitute a contravention of the s 92 freedom ‘so long as it appear[ed] that the detriment which it work[ed] to interstate trade [wa]s reasonably necessary to protect the interests of the public’.\footnote{North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW (1975) 134 CLR 559, 615 (Mason J) (emphasis added).
} Both Barwick CJ’s modified individual rights approach and the free trade approach acknowledged that a regulation could survive a challenge to its validity if it could be shown to be ‘reasonably necessary’. Nonetheless, each theory differed on what considerations would satisfy this criteria. Under Barwick CJ’s perspective, the impugned law had to promote freedom of interstate trade in some way, while under the free trade approach the law needed only to be in the public interest.\footnote{Ibid 272; Simpson, above n 6, 448 at fn 11.} The latter constituted a much broader category of regulations. Some commentators have cast the public interest exception to the free trade theory as requiring a balancing of interests on the part of the Court. For example, Michael Coper has suggested that in each case where the impugned legislation is pursuing a non-protectionist purpose promoting some public interest, the Court’s task is ‘to decide when that public interest should prevail over the public interest represented by s 92’.\footnote{Coper, Interstate Trade, above n 4, 262.} However, as will be explained below, this type of contextual interest balancing analysis has not found favour with the Court, which has instead preferred to strike a balance within its definition of ‘absolutely free’.\footnote{Ibid 277.}

\textbf{D. The fiscal burdens theory}

A fourth theory emerged in the 1970s, described by some commentators as rooted in the ‘free trade origins’ of s 92,\footnote{Buck v Bavone (1976) 135 CLR 110, 135 (Murphy J).} although its only advocate was Murphy J. His Honour took the narrowest view of the freedom embodied in s 92. For Murphy J, the constitutional provision only prohibited laws that sought to impose fiscal burdens, or customs duties, whether directly or indirectly.\footnote{Ibid 272; Simpson, above n 6, 448 at fn 11.} In taking such a narrow view of the scope of s 92, His Honour contended that the entirety of that scope...
should be applied absolutely. Murphy J reasoned that ‘[a]bsolute freedom can be applied to fiscal charges without difficulty, but it would produce chaos if applied to laws generally on interstate trade, commerce and intercourse.’

E. The overall impression

As the above brief survey has sought to convey, from the 1930s until the Cole v Whitfield watershed in the late 1980s, there were at least four different theories of s 92 vying for ascendency. Each attempted a different solution to the problem of locating a ‘judicially manageable criteria’ for applying the textually ambiguous concept of ‘absolutely free’. While reflecting different philosophical foundations, what all the theories shared in common was that they each took a definitional approach to s 92. That is, they each attempted to define the meaning of the freedom in the abstract. Nonetheless, their competition with each other and the failure of each to achieve ascendency in the period prior to Cole v Whitfield generated a landscape of confusion and disarray. The multiple approaches and inordinate number of exceptions gave the overall impression that the Court was, in fact, doing nothing more than balancing underlying competing interests on an ad hoc, case-by-case basis.

III. COLE v WHITFIELD AND BEYOND

A. The ascendency of the free trade theory

Competition for dominance between the rival theories of s 92 was finally resolved in the watershed joint judgment of the full Court in Cole v Whitfield. The backbone of the Court’s reasoning in Cole v Whitfield was its extensive examination of the drafting history of s 92. The Court was concerned to identify from this history ‘the contemporary meaning of the language used, the subject to which that

\[\text{\begin{align*}
\text{\footnotesize 42} & \text{ Ibid.} \\
\text{\footnotesize 43} & \text{ Coper, Interstate Trade, above n 4, 277.} \\
\text{\footnotesize 44} & \text{ Ibid 268.} \\
\text{\footnotesize 45} & \text{(1988) 165 CLR 360.} \\
\text{\footnotesize 46} & \text{ Ibid 385-392 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).}
\end{align*}\]
language was directed and the nature and objectives of the movement towards Federation’. 47

The Court’s examination suggested that the framers’ overriding concern in drafting s 92, along with ss 99 and 102, was the prevention of interstate protectionism and thus the promotion of national unity. 48 However, the framers’ consensus in this regard did not extend sufficiently far for them to agree on a express definition of the provision’s operation to be included in the final draft of the Constitution. A particular area of contention was what was required to create a free trade area within the Commonwealth. Did the achievement of such an object simply require the elimination of border customs and tariffs, or did it require limits to be placed on all regulation of interstate trade, including those ‘necessary for the conduct of business’? 49

Having examined this history, the Court in Cole v Whitfield displayed an acute awareness of its role with respect to s 92. It observed that in refraining from expressly limiting the freedom by clear language in the Constitution, the framers had left to the Court ‘the task of defining what aspects of interstate trade, commerce and intercourse were excluded from legislative or executive control or regulation’. 50 Over the course of time, the provision’s ‘enigmatic text’ had ‘defied judicial attempts to define enduring criteria of its application’. 51 However, these difficulties did not deter the Court from what it saw as its ultimate task. Just like those before it, the Court in Cole v Whitfield was in search a definition of the ‘absolutely free’ guarantee.

The Court swiftly rejected any contention that the provision should be given a definition broad in application and absolute in operation within that broad scope, as might be suggested by a purely textual reading of the words ‘absolutely free’. It described such an approach as a ‘guarantee of anarchy’ and inimical to the recognition by the framers of some need to identify specific classes of regulation to

48 Ibid 387-392, 394.
49 Ibid 391.
50 Ibid 394.
51 Ibid 385.
which the section would apply. The Court also rejected the individual rights theory as providing the required definition, noting that although it had come close, it had not achieved the status of ‘settled principle’. The Court was particularly critical of the Dixonian criterion of operation formula, which it described as ‘artificial’. It expressed concern that the formula ‘appeared to have the advantage of certainty’ but that that advantage ‘proved to be illusory’. The approach relied too heavily on obscure distinctions and excessive formality, and in doing so either unjustifiably prohibited ‘genuine non-protective regulation’ of interstate trade or devolved into uncertain application. 

The Court was similarly critical of the fiscal burdens approach, noting that the approach failed to offer a satisfactory judicial response to the most extreme forms of protectionism, such as the complete prohibition of particular classes of interstate goods. It concluded that the freedom could not sensibly be confined to fiscal burdens because ‘protection against interstate trade and commerce can be secured by non-fiscal measures’. Although Barwick CJ’s modified individual rights approach was not expressly discussed by the Court, rejection of that theory, too, was implicit in both its reasoning and in the result.

Ultimately, the Court adopted the free trade theory, holding that this approach best reflected the framers’ intentions as evinced by the drafting history and context of the provision. In giving effect to that theory, the Court settled on a relatively

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52 Ibid 394.
53 Ibid 400.
54 Ibid 402. It is also important to note that the individual rights approach espoused by Barwick CJ was criticised both judicially (Permewan Wright Consolidated Pty Ltd v Trewhitt (1979) 145 CLR 1, 26 (Stephen J), 34-5 (Mason J); Uebergang v Australian Wheat Board (1980) 145 CLR 266, 299 (Gibbs and Wilson JJ)) and in commentary (Coper, Interstate Trade, above n 4, 277: ‘the theoretical explanation based on the mutual accommodation of the rights of traders was unsatisfactory’). The crux of the criticism was that the approach could not properly explain the plethora of regulations that had been found permissible by the Court in previous cases.
56 Ibid 403.
57 Ibid 402.
58 However, Michael Coper notes that Murphy J’s response to such a contention would simply have been that it was within the power of the Commonwealth legislature to rectify such forms of protectionism and reinstate the ‘common market’: Coper, Interstate Trade, above n 4, 299.
60 This was a point recognized in later cases. See, for example, Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, 451 [11] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
precise definition of the s 92 freedom. The Court’s new test was that laws would be invalid for contravening the freedom if they imposed ‘discriminatory burdens on interstate trade of a protectionist kind’.  

**B. The two aspects of protectionism**

Implicit in the *Cole v Whitfield* judgment was that its new test had two distinct aspects. The first, and most obvious, was that regulation which sought to pursue a protectionist purpose as evident on the face of the law itself would be imposing a ‘discriminatory burden on interstate trade of a protectionist kind’. Thus, if law sought to discriminate between inter and intrastate trade, in the absence of a non-protectionist and plausible explanation offered for that discrimination, it would fall foul of s 92 for seeking to pursue a protectionist purpose.

It is, however, the second aspect of its test which has proved to be the more insightful and enduring in settling much of the difficulty around s 92’s scope. Having just undertaken a scathing analysis of the shortcomings of the individual rights approach, the Court was acutely aware of the dangers of relying on facial discrimination alone as the only relevant characteristic for identifying protectionism. Such an excessively formalistic approach was likely to reintroduce the same artificialities as those which had just been disavowed. Thus, the Court sought to ensure that the free trade approach was broad enough to cover ‘factual discrimination as well as legal operation.’ That is, the Court would scrutinise laws which, having a facially non-protectionist purpose, nonetheless had a protectionist effect in their factual operation. Such a protectionist effect would ordinarily manifest in the form of competitive advantage to domestic traders.

It is in this aspect of the *Cole v Whitfield* test where the Court drew a delicate but critical line between valid and invalid regulation burdening interstate trade and commerce. The existence of a protectionist effect was not, according to the Court, in itself sufficient to invalidate a law ostensibly pursuing a non-protectionist purpose. Rather, it was the trigger for the Court to scrutinise the law carefully. In

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62 Ibid 394, 398.
63 Ibid 399.
64 Ibid 407.
doing so, the Court would look to the *necessity* of the law in achieving the non-protectionist purpose put forward as its putative object. If the law was necessary to achieve that object, then the Court would accept that it had a non-protectionist purpose and it would survive scrutiny. If, however, the law was not necessary in the sense that there was some other way of achieving the same non-protectionist outcome with less protectionist effect, then the Court would be on solid ground in drawing the conclusion that the law was never really directed at the non-protectionist object. It was, therefore, properly characterised as a protectionist law and invalid.\(^{65}\)

In respect of this second aspect of its test, the Court acknowledged in remarkably frank fashion that, ultimately, its resolution would involve dealing with issues of fact and degree, or ‘judicial impression’ on which ‘minds might legitimately differ’.\(^{66}\) However, it is relevant to note that the Court was here referring specifically to difficulties surrounding the factual determination of whether there was some available alternative that might render the impugned law unnecessary.\(^{67}\) In other words, it was referring to the empirical uncertainty surrounding making evaluations of necessity, as discussed in Chapter 4. It was not, however, referring to any kind of contextual, case-by-case evaluation of the *importance* or *value* of the purported non-protectionist purpose of a law as against the *importance* or *value* of preserving an area free from protectionism. Conducting that kind of balance was not needed to give effect to the *Cole v Whitfield* definitional test.

### C. Applications of the necessity test

In *Cole v Whitfield*, the Court reached the conclusion that Tasmania’s undersized crayfish regulation was neither pursuing a protectionist *purpose* on its face nor generating a protectionist *effect*. It was therefore unnecessary for the Court to engage with the necessity test in finding that the law was not invalid by operation of s 92 (although it did do so in obiter). In the later case of *Castlemaine Tooheys*...

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\(^{65}\) Ibid 408.

\(^{66}\) Ibid 409.

\(^{67}\) Ibid 407-8.
In *Castlemaine Tooheys*, the Court was faced with a challenge to South Australian regulation which facially did not discriminate between intra and interstate trade. Instead, it drew a distinction between non-refillable and refillable bottles for the packaging of beer. Producers of the former were subject to greater levies than those of the latter, making the selling of beer in non-refillable bottles in South Australia commercially unviable. Since most of South Australia’s brewers packaged their beer in refillable bottles, while interstate brewers used non-refillable bottles, the practical effect of the law was protectionist in the sense that it conferred a competitive advantage on the domestic South Australian brewers.

South Australia argued that the objects of the regulation were non-protectionist. The objects were to protect the environment, by reducing waste, and to conserve energy, by reducing the need to manufacture bottles. The majority joint judgment applied a test which checked the necessity of the law in achieving its purported non-protectionist aims:

> There is some room for a comparison, if not a balancing, of means and objects in the context of s. 92. The fact that a law imposes a burden upon interstate trade and commerce that is not incidental or that is disproportionate to the attainment of the legitimate object of the law may show that the true purpose of the law is not to attain that object but to impose the impermissible burden.\(^{69}\)

The plurality concluded that because the measures employed in the impugned laws were broader than necessary to achieve the purported environmental and conservation purposes, the impugned laws were actually trying to achieve a protectionist purpose and were therefore invalid.\(^{70}\)

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\(^{68}\) (1990) 169 CLR 436.

\(^{69}\) *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

\(^{70}\) Ibid 475 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). Gaudron and McHugh JJ, writing in a separate joint judgment, took a different approach. Their Honours observed that if the ‘practical effect’ of a law is protectionist, then it will ‘offend against s. 92’ even if it is ‘a law which is appropriate and adapted to an objective and burdens interstate trade only incidentally and not disproportionately to that objective’: *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 480.
The special case in *Betfair Pty Ltd v Western Australia*\(^71\) was decided on similar grounds. It concerned the validity of Western Australian laws prohibiting the provision of a ‘betting exchange’\(^72\) to residents of that State,\(^73\) and requiring approval before information pertaining to a ‘WA race field’\(^74\) could be published.\(^75\) Betfair was not given the necessary approval. Western Australia contended that the prohibition and the refusal to approve were necessary for the protection of the integrity of Western Australian racing. The plaintiffs (the first of whom was a betting exchange provider based in Tasmania and second of whom was a resident of Western Australia) contended, on the other hand, that the laws were not reasonably appropriate and adapted to pursuing the purported non-protectionist purpose of ‘protecting the integrity of racing and sporting events occurring in Western Australia’\(^76\).

The majority, opining jointly, sided with the plaintiffs. In doing so, they referred to a Tasmanian scheme of regulation as an example of ‘effective but non-discriminatory regulation’\(^77\) which preserved the integrity of racing in Tasmania without imposing discrimination upon interstate traders.\(^78\) On the basis of this available alternative, the joint justices concluded that the impugned Western Australian laws – which sought to prohibit betting exchanges outright – were not ‘necessary’ or ‘appropriate and adapted to the propounded legislative object’ of protecting racing integrity.\(^79\) Although the majority did not go so far as to explicitly

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\(^71\) (2008) 234 CLR 418.

\(^72\) Described in a report published by the Australasian Racing Ministers’ Conference Betting Exchange Task Force on 10 July 2003, and referred to by the plurality in *Betfair v Western Australia* (2008) 234 CLR 418 at 449-50 [6]-[8], as ‘...a means by which parties stake money on opposing outcomes of a future event – such as a horse race or football game. Exchanges are structured to facilitate customers betting that a particular outcome will or will not occur. It is this ‘against backing’ (or backing to lose) aspect particularly in which betting exchanges differ from traditional forms of wagering in Australia – with bookmakers or totalizators (TABs).’

\(^73\) Section 24(1aa) of the *Betting Control Act 1954* (WA), when read with ss 12 and 13 of the *Criminal Code* (WA).

\(^74\) Defined in the *Betting Control Act 1954* (WA) as ‘information that identifies, or is capable of identifying, the names or numbers of the horses or greyhounds — (a) that have been nominated for, or that will otherwise take part in, an intended race to be conducted in this State; or (b) that have been scratched or withdrawn from an intended race to be conducted in this State.’

\(^75\) Section 27D(1) of the *Betting Control Act 1954* (WA).

\(^76\) *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 424.

\(^77\) Ibid 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

\(^78\) Ibid 478-9 [107].

\(^79\) Ibid 480 [112].
label the impugned laws protectionist, it was unnecessary to do so as the implication was inescapable.

As is evident from the preceding discussion, the majority approach in *Betfair* accords with the necessity approach applied in *Castlemaine Tooheys*. However, it is important to acknowledge that at times the joint justices in *Betfair* did critique the earlier decision as presenting ‘some obscurities’.  

They also included a passage in their judgment which, if read on its own, is sufficiently ambiguous to suggest that they might have been willing to engage in an evaluative balancing exercise going beyond a mere examination of necessity:

…with respect to the “appropriate and adapted” criterion expressed in *Castlemaine Tooheys*, counsel for the plaintiffs and for Tasmania submitted that necessarily it involves the existence of a “proportionality” between, on the one hand, the differential burden imposed on an out-of-State producer, when compared with the position of in-State producers, and, on the other hand, such competitively “neutral” objective as it is claimed the law is designed to achieve…

Reference to the term ‘proportionality’ in this passage, albeit in what appears to be a non-technical sense, does nothing to illuminate its meaning and only adds to its ambiguity. However, it would be a mistake to read the above passage in isolation. The immediately following paragraphs of the judgment make clear, through their references to the judgments in *Cole v Whitfield* and *Castlemaine Tooheys*, respectively, that ultimately the *Betfair* majority meant nothing more by the passage than that the application of the necessity test is critical to deciding cases of factual discrimination (or protectionist effect). By concluding that the Western Australian laws were not ‘necessary’, and thus ‘not proportionate’ and ‘not appropriate and adapted’, it is clear that they intended all three terms to be used interchangeably.

Finally, the issue did not strictly arise in *Betfair Pty Ltd v Racing New South Wales (‘Betfair No. 2’)*, since the Court unanimously found that there had not been

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80 Ibid 476 [99].
81 Ibid 477 [102]-[103].
82 Ibid 477 [103].
83 Ibid 477-8 [104].
84 Ibid 479 [110].
‘interstate discrimination of a protectionist kind’ against the plaintiff. Nonetheless, writing jointly, five members of the Court suggested that if it had been established that there was discrimination conferring a competitive disadvantage on an interstate trader (in the factual sense of having that effect), the relevant question would be whether ‘that burden nonetheless is reasonably necessary for [the State] to achieve a legitimate non-protectionist purpose’.86 Similarly, Kiefel J, writing separately, observed that ‘where it is contended that, despite a measure imposing a discriminatory burden of a protectionist kind, it is justified because it is directed to the achievement of a non-protectionist purpose… it is usually required that the measures be reasonably necessary to achieve that legitimate purpose’.87

D. A rejection of evaluative balancing

The above examination of the doctrine has sought to demonstrate that the Cole v Whitfield definitional approach to s 92 does not require the Court to undertake an evaluative balancing of competing interests. That is, it does not require the Court to assess the normative value of the purported non-protectionist purpose of a law which has a protectionist effect as against the normative value of protecting free trade against protectionism. Rather, the focus of the Cole v Whitfield test is on characterization of an impugned law as either protectionist or not. The necessity test can be used in aid of the test because it is capable of ‘smoking out’ a protectionist purpose which is not apparent on a law’s face. However, just as in the characterization context discussed in Chapter 6, the analytical similarity between this test and the necessity stage of proportionality analysis does not mean that each test is directed to the same end. The latter is focused on evaluating whether a law has unjustifiably infringed on a competing interest, while the former is focused on determining a law’s purpose.

Notwithstanding this distinction, there is a line of commentary on s 92 which has suggested that the determination of s 92 cases involves ‘weighing, balancing and value judgments’88 and ‘balanc[ing] the competing interests represented by the legislative choice, on the one hand, and the constitutional requirement of freedom

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86 Ibid 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (emphasis added).
87 Ibid 295 [136] (Kiefel J) (emphasis added).
for interstate trade, on the other. The High Court itself has recently picked up on this commentary, with a majority of the Court citing Leslie Zines as having ‘observed that notions of balancing may be seen in *Castlemaine Tooheys Ltd v South Australia*’.  

Some of the commentary in this area can be understood by virtue of the fact that it pre-dates *Cole v Whitfield*. Thus, for example, in respect of a string of marketing cases decided in the late 1970s, Michael Coper observed they ‘clearly required a complex balancing of many considerations’, including ‘the degree of impact of the restrictions upon interstate trade’ and the ‘availability and viability of other modes of achieving the desired object’. These observations were, it seems, accounting for the penumbra of approaches and exceptions which had proliferated prior to *Cole v Whitfield*, which, in collectively lacking any compelling rationale, would have appeared to look much like case-by-case balancing.

However, the claim has also been made since *Cole v Whitfield*. For example, it has been suggested that, by reference to the concept of ‘reasonable necessity’, the Court’s post-*Cole v Whitfield* jurisprudence is actually undertaking a kind of evaluative balancing exercise. The contention is that the word ‘reasonably’ should be read here as implying ‘some balancing of the importance of the end with the degree of the restriction’. That suggestion is, however, difficult to reconcile with the absence in the case law of any evaluation of this nature. The more plausible interpretation, which accords more closely with the manner in which the cases have been decided, is that ‘reasonably’ in this context merely suggests a level of deference to legislative choice. That is, in applying the necessity test, the Court is refraining from engaging in a far-ranging inquiry into all possible alternatives, and will only invalidate a law if there is an ‘obvious and compelling’ alternative.

Under such an interpretation, the phrase ‘reasonably necessary’ does not import an evaluative balancing.

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92 Kirk, above n 16, 12.
Further support for the view that the Court is not engaging in evaluative balancing may be found in its concerted efforts to distance Australian jurisprudence from US case law adopting such an approach. For example, in Castlemaine Tooheys, the plurality referred to a series of US Supreme Court judgments and then extracted the following passage from Pike v Bruce Church Inc.\(^9^4\) which it described as synthesising the various doctrinal approaches taken by the Supreme Court into ‘one general rule’:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits…If legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.\(^9^5\)

It is relevant to note that both the Supreme Court and the plurality in Castlemaine Tooheys expressly referred to the above ‘general rule’ as a ‘balancing test’.\(^9^6\) The plurality then went on to disavow this American form of ‘balancing’, contending that it did not align with the approach set down in Cole v Whitfield. In doing so, the joint justices observed:

…the American balancing process is carried out only after a law has been found to be directed towards a non-discriminatory purpose so that the burden on interstate commerce is “incidental” to that legitimate purpose. In contrast, we are concerned only with the proper characterization of the law as protectionist or not, in the sense described in Cole v Whitfield.\(^9^7\)

\(^9^5\) Ibid 142.
\(^9^6\) Castlemaine Tooheys v South Australia (1990) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) (emphasis added).
\(^9^7\) Ibid 471 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). It is important to note that although the majority in Castlemaine Tooheys disavowed this aspect of the American jurisprudence, they did not reject the relevance of American case law entirely. Prior to Castlemaine Tooheys, the Court had been hesitant to embrace the jurisprudence on the US commerce clause since it appeared to draw its interpretation from very different philosophical foundations to s 92, and particularly notions of laissez-faire economics. For example, in Cole v Whitfield, the full Court indicated that it had not referred to these cases because they did not provide any assistance in interpreting s 92: Cole v Whitfield (1988) 165 CLR 360, 405 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). In Castlemaine Tooheys, the plurality overcame this obstacle by limiting its comparison to cases that are underpinned by notions of ‘national economic unity’ rather than ‘free trade’ in the laissez-faire sense: see Castlemaine Tooheys v South Australia (1988) 169 CLR 436, 470 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). In Barley Marketing Board v Norman (1990) 171 CLR 182, 203-4, the Court returned to its skepticism regarding the relevance of the US cases, but this hesitance was cast aside in Betfair Pty Ltd v Western Australia (2008) 234 CLR 418, 461-3 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
IV. COMPETING MODERN APPROACHES TO SECTION 92

In the years since Cole v Whitfield was decided, two competing accounts of s 92 jurisprudence have emerged. The first – the ‘improper purpose’ theory – sees the identification of a protectionist purpose as the ‘touchstone’ for legislative invalidity in this area. The second – the proportionality approach – considers structured proportionality as the key test for legislative validity. Arguments in favour of each theory have been made both descriptively and prescriptively. In the following section, each account will be considered to see if either is capable explaining the entire scope of s 92 jurisprudence (in relation to the descriptive accounts) or suggesting necessary developments in that jurisprudence (in relation to the prescriptive accounts).

A. Improper purpose theory: the descriptive account

David Sonter has argued that ‘the criterion of invalidity after Cole v Whitfield is legislative intention or object and not the effect of the legislation’. In making his case, Sonter has pointed to certain judicial passages which, in his view, support the proposition that legislative intent was important to identifying ‘discrimination of a protectionist kind’. In particular, he cites references in Cole v Whitfield to the Court’s identification of an absence of a ‘discriminatory protectionist purpose’ and its narrowed focus on the ‘object of the prohibitions’. Similar references to ‘protectionist purpose’ were made in the plurality judgment in Castlemaine Tooheys.

To the extent that Sonter’s claim can be framed as pointing to the importance of identifying a protectionist purpose, fault cannot be found. As discussed in the

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99 Kirk, above n 16.
100 In respect of the improper purpose descriptive account, see Sonter, above n 98.
101 In respect of the improper purpose prescriptive defence, see Simpson, above n 6. In respect of the proportionality prescriptive defence, see Kirk, above n 16.
102 Sonter, above n 98, 332.
103 Ibid.
previous section, the uncovering of a law’s ‘true’ protectionist purpose or, as Sonter has put it, its ‘pith and substance’, is critical to the Court’s analysis. However, Sonter seems to gloss over the additional and clear references in the cases to protectionist effects flowing from the pursuit of non-protectionist purposes.106 To the extent that he does deal with them, Sonter reasons that a legislative effect is only relevant ‘insofar as it is the primary indicium of the legislative will; the court operating upon the implicit assumption…that a legislature is presumed to have intended the consequences of its enactments’.

This suggested relevance does not accord with the emphasis that the cases decided from Cole v Whitfield onwards have given to necessity analysis. That is, if the Court could simply presume from the identification of protectionist effects an intention to pursue a protectionist purpose, there would be no need to consider further whether the law was necessary to achieve a purported non-protectionist purpose.

B. Improper purpose theory: the prescriptive argument

Amelia Simpson has also rejected Sonter’s descriptive account of s 92 jurisprudence on the basis that it did not align with the decided cases.108 Nonetheless, she is sympathetic to the idea of legislative purpose prescriptively forming the ‘touchstone’ for validity in s 92 cases. The critical task, in Simpson’s view, is that the Court determine the legislature’s ‘true purpose’. That will be an evaluative exercise, assessing the plausibility of the asserted purpose of the impugned law. Where the asserted purpose is implausible on the basis that the impugned law is overbroad in its means for achieving it, the law can be assumed to be achieving an illegitimate, specifically protectionist, purpose. To this extent, Simpson’s suggested approach is not controversial and aligns well with the analysis undertaken by the majority in Castlemaine Tooheys to ‘smoke out’ an illegitimate protectionist purpose, as discussed in the previous section.

However, Simpson also suggests that ‘unintentional protectionist discrimination’ ought to be ‘excluded from section 92’s purview’ entirely.109 That is, there is no

107 Sonter, above n 98, 339.
108 Simpson, above n 6, 453-55.
109 Ibid 462.
need for the Court to consider protectionist effects once it has been determined that there is no objective protectionist purpose. The principal rationale is said to be a federalist one – the preservation of federal goodwill.\textsuperscript{110} Focusing on a law’s purpose rather than effects would preserve such goodwill since ‘[e]veryday experience tells us that goodwill breaks down as a result of ill-intentions more so than as a consequence of inadvertent yet harmful actions’.\textsuperscript{111} On the other hand, Simpson argues, focusing on the law’s effects would principally make a ‘contribution to the economic wellbeing of citizens’ only.\textsuperscript{112}

A second rationale is an institutional one drawn from the limits of the Court’s competency as an apex Court. Simpson argues that the identification of a ‘market’ and a ‘market advantage’ are difficult evidentiary questions of a ‘complex and technical nature’ requiring economic expertise. The Court, ‘constituted by judges whose principle training lies in the law rather than the highly specialised and conceptually far-removed discipline of economics’ is not, therefore, equipped to make the evidentiary findings necessary to identify ‘protectionist effects’.\textsuperscript{113}

There are, however, difficulties with these propositions. As to the first rationale, the connection drawn between protectionist effects and the ‘economic wellbeing’ of the citizenry is not an obvious one, at least when it is posited in exclusive terms. Perhaps more fundamentally, however, the Court’s current approach means that where a law does not have a facially evident protectionist purpose or a protectionist effect, there is no need for the Court to undertake a more speculative search for an underlying protectionist purpose. For example, in \textit{Cole v Whitfield}, it was strictly unnecessary for the Court to engage in an analysis of protectionist purpose since it had already reached the conclusion that the law in question did not have a protectionist effect. The approach thus has the advantage of permitting the Court to deal with appropriate cases on less politically contentious grounds than under the improper purpose approach advocated by Simpson.

\textsuperscript{110} Ibid 470.
\textsuperscript{111} Ibid 471.
\textsuperscript{112} Ibid 470.
\textsuperscript{113} Ibid 479.
As to the second rationale, the evidentiary challenges that underpin determinations regarding legislative effects are certainly real and significant, and have been alluded to by a number of commentators. Overreliance on the parties reaching an agreed set of facts or on the concept of ‘judicial notice’ has the potential to raise concerns regarding accuracy in fact-finding. Nonetheless, there are procedural mechanisms at the Court’s disposal in cases raising particularly complex evidentiary hurdles, such as remitting the case to the Federal Court under s. 44 of the *Judiciary Act 1903* (Cth). Furthermore, recent cases have proved the Court to be remarkably adept at handling complex market concepts, such as substitutability analysis, against a background of novel developments in commerce and technology. It is perhaps for these reasons that the Court has, at least since *Cole Whitfield*, been explicit in acknowledging that both protectionist purpose and protectionist effects will have a role to play in a s 92 inquiry.

C. Structured proportionality: the descriptive account

As noted above, some commentators have suggested that there is an inherent balancing exercise being conducted by the Court in determining the validity of laws subject to a s 92 challenge. Jeremy Kirk has also suggested that discernible in the judgments are the stages of structured proportionality, albeit not expressly acknowledged as such by the Court. For example, Kirk has characterised the judgment of Stephen and Mason JJ in *Uebergang v Australian Wheat Board* in the following way:

Their statement of the applicable test was that the legislation be ‘no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest’. They made it clear that the test involved balancing the adverse effect on interstate trade with the ‘need which is felt for the regulation’. They also indicated that the validity of the legislation could be affected if there were alternative practicable means of achieving the end with less effect on interstate...

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115 See, for example, Justice Kiefel’s extra-curial concerns that ‘[t]he use of agreed statements of fact is not likely to be sufficient’ and ‘there are limits to the assumptions that the Court will be prepared to make’: Kiefel, above n 9, 15. See also, Andrew Bell, above n 114, 245-6.
117 Kirk, above n 16, 12-3.
118 Ibid 13-6.
trade. Thus, second [necessity stage] and third [strict proportionality stage] level proportionality clearly emerge from this approach.\(^\text{120}\)

The reasoning, Kirk has argued, is directed at assessing the \textit{justification} for an impugned law’s infringement of the s 92 freedom and is therefore engaging in proportionality-style analysis. Kirk has also contended that similar reasoning can also be located in the judgments of Mason and Jacobs JJ in \textit{Clark King & Co Pty Ltd v Australian Wheat Board},\(^\text{121}\) the majority in \textit{McGraw-Hinds (Aus) Pty Ltd v Smith}\(^\text{122}\) and Gibbs J in \textit{Permewan Wright Consolidated Pty Ltd v Trehwitt}.\(^\text{123}\) However, it ought to be noted that each of these cases was decided years before \textit{Cole v Whitfield}. Thus, while Kirk’s characterisation of the analysis undertaken in them may be insightful, it is difficult to trace their direct relevance to the post-\textit{Cole v Whitfield} landscape.

In terms of post-\textit{Cole v Whitfield} cases, Kirk has cited the majority judgment in \textit{Castlemaine Tooheys} in support of his argument. The assertion is that, although the Court has not expressly acknowledged it, ‘all three levels of proportionality seem to be included’\(^\text{124}\) in the following paragraph:

\begin{quote}
…legislative measures which are appropriate and adapted to the resolution of those [identified community] problems would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.\(^\text{125}\)
\end{quote}

Kirk considers that the suitability test is implied by the use of the phrase ‘appropriate and adapted’ and that the court’s subsequent analysis demonstrates the necessity test. It is contended that, given the majority’s conclusion on necessity, it did not need to consider strict proportionality but that, nonetheless, ‘the formulation of the test implicitly acknowledges that the burden of the restriction on interstate trade has to be balanced against the benefit of achieving the legitimate end’.\(^\text{126}\)

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\item[120] Kirk, above n 16, 13.
\item[121] (1978) 140 CLR 120, 191-3.
\item[122] (1979) 144 CLR 633, 647-8 (Gibbs J), 660 (Mason J), 670 (Murphy J), 671 (Aitken J).
\item[123] (1979) 145 CLR 1, 18.
\item[124] Kirk, above n 16, 14.
\item[125] (1990) 169 CLR 436, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
\item[126] Kirk, above n 16, 14-5.
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The direction in which the jurisprudence has developed over time appears to have weakened some of the explanatory force of this analysis. The cases from *Cole v Whitfield* onwards have been decidedly silent on any assessment of the ‘benefit’ or ‘value’ or ‘importance’ of a non-protectionist end, or balancing that value against ‘the burden of the restriction on inter-State trade’. Such an approach would have made sense if the Court was engaged in an exercise of finding a justification for an incursion into a protected freedom by reference to its relative normative value and the degree of the incursion. In those circumstances, application of the ‘necessity’ stage of structured proportionality would ensure that the impugned law did not encroach upon the protected freedom any more than absolutely necessary. It would do so by checking that there were no less incursive alternatives available. As discussed in Chapter 2, the necessity test operates in this way as a proxy for balancing.

However, as is evident from the survey of the post-*Cole v Whitfield* jurisprudence undertaken earlier in this chapter, the application of necessity analysis in *Castlemaine Tooheys* appears not to have been directed at this kind of evaluative balancing exercise. Rather, it seems that it was aimed at the very different goal of uncovering or ‘smoking out’ an unconstitutional (that is, protectionist) legislative purpose. The logic of the necessity test in this context proceeds as follows. Where the means used to achieve the asserted ends are overbroad, it is open for an assumption to be made that the purpose behind the impugned law is not the asserted one, or at least the asserted one is not the only purpose. This leaves room for the implication that the legislature is actually pursuing some other end. In light of the earlier finding that the law has a protectionist effect, the Court is therefore on safe ground assuming that other end is a ‘protectionist’ one.

Once a protectionist purpose has been identified, there is no further analysis or justification based on an assessment of the ‘importance’ or ‘value’ of the asserted non-protectionist end. As

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128 See, for example, the following observation by Jeremy Kirk: ‘[t]hat a law infringes a protected interest in a way which is unnecessary or excessive may indicate that the real purpose of the law is other than that which has been claimed’: Kirk, above n 16, 6.
soon as the law is characterised as pursuing a protectionist end, the s 92 freedom operates absolutely and the law will be found invalid.

It is for this reason, perhaps, that we do not find in the cases decided after *Cole v Whitfield* any evaluative, balancing reasoning.\(^{129}\) Indeed, in *Castlemaine Tooheys* itself, the majority justices went so far as to expressly disavow such a form of reasoning.\(^{130}\) The necessity test in s 92 cases, although possessing analytical similarity to the necessity test undertaken in structured proportionality, is directed at a different functional end and should not be confused with its balancing counterpart.

**D. Structured proportionality: the prescriptive argument**

Even accepting that the Court’s current jurisprudence does not appear to accord with a structured proportionality approach, might it still be argued that the Court should in future cases take such an approach? Writing extra-curially in 2010, for example, Justice Susan Kiefel referred to the use of structured proportionality in European Court of Justice (ECJ) jurisprudence relating to provisions in the *Treaty Establishing the European Community* ‘with similar objectives to those of s 92’.\(^{131}\) She noted that the term ‘necessity’ is sometimes used to denote two different concepts in ECJ case law. The first is a consideration of whether the legislation under consideration is necessary, in the sense that there are no available alternatives less restrictive of the protected right or freedom. The second is the question of whether the ‘effects of the legislation are necessitated by its legitimate objects’.\(^{132}\) The first usage roughly equates to the necessity stage of structured proportionality, while the latter generally conforms with balancing undertaken under the strict proportionality stage. Justice Kiefel observed that the ECJ has used both meanings

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\(^{129}\) As Kiefel J observed of these cases in *Rowe v Electoral Commissioner*: ‘although the expressions “appropriate and adapted” and “proportionate” were used, the test applied was that of the availability of alternative, practicable and less restrictive measures’: (2010) 243 CLR 1, 135 [442].

\(^{130}\) Simpson, above n 6, 460.

\(^{131}\) Kiefel, above n 9, 4.

\(^{132}\) Ibid 12-3.
of the term, sometimes not distinguishing between them, and that the High Court may also consider using both.\textsuperscript{133}

It is suggested, however, that structured proportionality would not be an appropriate judicial method in this context and that the theoretical framework developed in Part I of this thesis can assist in explaining why. In Part I it was argued that structured proportionality is an appropriate analytical tool when a ‘balancing problem’ arises. The key characteristics of a balancing problem are: (1) that there are two conflicting sets of rights or interests; (2) each of which operates, prima facie, on the same normative plane; (3) neither of which is absolute; and (4) at least one of which cannot be defined in the abstract. The existence of these features means that there is a conflict between principles, and this necessitates a contextual evaluation of whether the burden imposed by one right or interest on the other can be justified. Structured proportionality is a method that is inherently suited to this task.

When the characteristics of the balancing problem are compared with those that arise in s 92 cases it can be seen that while some characteristics are satisfied, others are not. The first characteristic of the balancing problem, for example, is satisfied. Thus, when a challenge is brought the Court must first identify whether the impugned law imposes a burden on interstate trade and commerce. Where it does, there are two sets of rights or interests in conflict: on one hand, there is the interest, purpose or outcome which the law is seeking to achieve while, on the other hand, there is the freedom afforded by s 92 to be free of protectionism.

Similarly, the second characteristic is also satisfied since the interests in conflict \textit{prima facie} exist on the same normative (constitutional) plane. On one hand, there is an exercise of legislative power and, assuming that it is a lawful exercise under one of the heads of power in s 51 or plenary state power, the interests embodied in the legislation have a constitutionally-sanctioned force. On the other hand, s 92 is an express freedom found in the Constitution. Thus, unlike common law interests discussed in Chapter 6, no concerns regarding the constitutionalisation of unconstitutional interests are raised.

\textsuperscript{133} Ibid 13.
Difficulties do arise, however, in satisfying the third and fourth characteristics of the balancing problem in light of the definitional approach taken in *Cole v Whitfield*. In deciding that the words ‘absolutely free’ mean ‘free from discriminatory burdens of a protectionist kind’, the Court in *Cole v Whitfield* gave the s 92 freedom a fixed definition in the abstract. In other words, by defining s 92, the Court gave it a concrete meaning to be applied to the factual circumstances of each case in a rigid manner. Furthermore, within its defined scope, s 92 has an absolute operation. That is, if a law falls within the description of being a ‘discriminatory burden of a protectionist kind’, it will be invalid for running afoul of s 92. On the other hand, if the law is outside the scope of the definition – such as where it pursues a non-protectionist purpose which has a protectionist effect – then s 92 does not bite. In that sense, the Court’s definitional approach to s 92, established in *Cole v Whitfield* and followed in subsequent cases, operates like a rule. It leaves no room for the case-by-case contextual balancing of interests that would have been required had the words ‘absolutely free’ not been given a fixed definition. Indeed, the underlying balancing of the competing interests is baked into the definition of itself.

In the absence of the balancing problem, structured proportionality is not currently an appropriate analytical method for resolving s 92 cases. If, however, future jurisprudence veers away from the *Cole v Whitfield* definitional approach, then this conclusion might need to be revisited. If, for example, the Court reverted to an abstract concept of ‘absolutely free’ trade, which could only be given concrete meaning within the specific factual circumstances of a particular case, then structured proportionality might have some analytical utility. In that situation, the method could assist in contextually balancing the value of protectionism against the value of a non-protectionist purpose being pursued by legislation otherwise burdening s 92. This is not, however, the position of the current jurisprudence.

It also appears that it would be unwise for the jurisprudence to depart significantly from the stability which has been provided by the *Cole v Whitfield* definition. Prior to that case, over 140 cases concerning s 92 had reached the High Court for determination. In the 30 years since it was decided, that number has been reduced to a mere handful. Such a reduction in litigation suggests that the *Cole v Whitfield*
definition has an underlying integrity which its predecessors lacked and that the Court should be very cautious about even inadvertently undermining it.

V. CONCLUSION

No provision of the Australian Constitution has demanded more judicial attention than s 92. Over the legions of cases decided prior to *Cole v Whitfield*, at least four different approaches to so 92 emerged, each vying for ascendancy and not one reaching that position. The result was a landscape of confusion in which there was a myriad of competing approaches and endless exceptions being made to them. When viewed collectively, they appeared to amount to nothing more than case-by-case balancing of competing interests. Against this background, the test set down in *Cole v Whitfield* has been revolutionary. It has provided a stable and enduring definition of the scope of the freedom embodied in s 92. After *Cole v Whitfield*, it has been patently clear that s 92 invalidates any law that seeks to impose a ‘discriminatory burden of a protectionist kind’.

The test has two aspects. On one hand, it operates to invalidate any law that on its face seeks to pursue a protectionist purpose. On the other hand, it also invalidates any law that has a protectionist effect in its practical operation and, upon closer examination, reveals an underlying protectionist purpose. That purpose is uncovered through the use of necessity analysis. If the law is purported to be pursuing a non-protectionist purpose for the achievement of which it is necessary, then the law is not considered protectionist. On the other hand, if the law is not necessary to achievement of a non-protectionist purpose, in the sense that there is some other way of achieving that purpose with less protectionist effect, then the law is considered insufficiently ‘appropriate and adapted’ to the non-protectionist purpose. In other words, it is imputed that the law’s enactment was motivated by a protectionist purpose and that it therefore falls foul of the s 92 freedom.

Since the decision in *Cole v Whitfield*, competing approaches have emerged which have sought to provide either a descriptive account of the modern s 92 jurisprudence or a prescriptive argument as to how that jurisprudence ought to develop. The descriptive account associated with the ‘improper purpose theory’, for example, suggests that the modern jurisprudence can be explained by understanding the
‘touchstone’ of the *Cole v Whitfield* approach as being whether a law is pursuing an improper (protectionist) purpose. This account falls short, however, since it fails to adequately capture the incontrovertible role that protectionist *effect* has to play in the jurisprudence. The prescriptive argument based on the same theory acknowledges that descriptive account does not adequately explain the state of the jurisprudence. Nonetheless, it argues that protectionist purpose *should* become the touchstone in this area. This approach falls short in its own way by failing to acknowledge that there is utility to deciding cases on the basis of an absence of a protectionist effect, as the Court did in *Cole v Whitfield* itself. The utility lies in allowing the Court to dispose of appropriate cases without needing to engage in a more contentious, and perhaps somewhat speculative, evaluation of legislative purpose.

A different descriptive account suggests that the application of the test established in *Cole v Whitfield* involves an unacknowledged application of structured proportionality. This account suggests that the Court is, in effect, conducting an evaluative balancing exercise under its application of ‘reasonable necessity’. This descriptive account does not accord with the development of jurisprudence, however, since the cases decided in the post-*Cole v Whitfield* era provide no support for the suggestion that the Court is engaged in evaluative balancing. Furthermore, the Court has expressly sought to distance itself from such an approach.

There has nevertheless been some prescriptive suggestion that even if the Court’s current jurisprudence does not involve a structured proportionality approach, perhaps it should look to adopting such an approach in the future. The theoretical framework developed in Part I of this thesis assists in explaining why this would be a mistaken development. It illuminates that in the wake of the Court’s *Cole v Whitfield* definition approach to s 92, cases arising in this context do not possess the characteristics of a ‘balancing problem’. Specifically, in defining s 92’s scope in the abstract and giving the provision an absolute operation within that scope, the Court has transformed the s 92 freedom into a ‘rule’. Of course, there are issues of fact and degree in the application of that rule, and it may raise matters of empirical uncertainty. But its application does not require a contextually sensitive balancing
approach. As such, structured proportionality is not an appropriate judicial method in this context.

Finally, it should be observed that there are, of course, distinct analytical similarities between the ‘necessity’ stage of structured proportionality analysis and ‘smoking out’ analysis which aids in uncovering non-facial protectionist purpose. Both are concerned with locating alternative means to an impugned law to achieve the same purpose as the law but with less adverse effects. However, it should also be noted that the identification of such alternative means has different implications in each form of analysis. For ‘smoking out’ analysis, the overbreadth of a law suggests that the purpose that it was purportedly seeking to achieve may not have been its true purpose. This is not an evaluative exercise in the sense of assessing competing interests against each other. On the other hand, the identification of the alternative means under the necessity stage of structured proportionality is a proxy form of balancing. The identification of alternative means suggests that the impugned law has intruded unjustifiably into the competing interest. It is, therefore, an evaluative test of justification not purpose. The two tests, although analytically similar, are directed at different ends. The danger in confusing them is that it potentially opens the door to the inadvertent introduction of an evaluative balancing method, such as structured proportionality, into a context to which it is not suited.
CHAPTER 8.

PROPORTIONALITY AND THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

I. INTRODUCTION

In the previous chapter, the role of structured proportionality was considered in the context of an express freedom contained in the Australian Constitution, s 92. In this chapter, the focus now turns to a constitutional freedom that has been implied by the High Court from the text and structure of the Constitution: the implied freedom of political communication (‘implied freedom’).

The implied freedom was not expressly recognised until majorities in two cases, *Nationwide News Pty Ltd v Wills*\(^1\) and *Australian Capital Television Pty Ltd v Commonwealth*,\(^2\) adopted that position in 1992.\(^3\) Those majorities held that the implication was necessary to allow the people of the Commonwealth to discharge their function within the system of representative and responsible government established by the Constitution. The majority justices held that without some constitutional protection from laws that would otherwise take away the right to communicate on political matters, each person would become ‘an island, unable to communicate with any other person’,\(^4\) collectively reducing the capacity of the people to become sufficiently informed to vote intelligibly.\(^5\)

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\(^1\) (1992) 177 CLR 1, 50 (Brennan J), 76 (Deane and Toohey JJ), 94-5 (Gaudron J).

\(^2\) (1992) 177 CLR 106 (Mason CJ, Deane, Toohey and Gaudron JJ).

\(^3\) Justice Murphy had suggested in earlier cases that a freedom of political communication ought to be implied: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-4. However, his Honour’s suggestion was not taken up by the rest of the Court in either case.

\(^4\) *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ).

\(^5\) Ibid 46-7 (Brennan J).
The implication was, at the time, considered by many a radical departure from the status quo. Jeffrey Goldsworthy, for example, described it as being based on ‘dubious’ methodology and failing to recognise the original intent of the framers of the Constitution. Since then, it has been subject to bouts of judicial critique. In the main, however, these episodes have been fairly isolated and the implication’s position as an orthodox feature of Australian constitutional law has been cemented in two decades of decided cases, even though there remain points of contention around its content and methods used to adjudicate upon it.

In recent challenges brought on the basis of the implied freedom, three distinct approaches have been taken. In the first of these approaches – endorsed by the majority in their joint judgment in *McCloy v New South Wales* – ‘structured proportionality’ is amalgamated into the orthodox tests set down by the Court in *Lange v Australian Broadcasting Corporation*. The analysis proceeds in fixed stages and, ostensibly, a single standard of review is applied irrespective of the circumstances of the particular case. Under the second approach, favoured by Gageler J but with antecedents in much earlier decisions, a more flexible analytical structure is adopted the focus of which is on finding a justification for the impugned law. Under this approach, the degree of judicial scrutiny is calibrated to the nature and degree of the burden placed on the implied freedom. Proponents of a third approach, such as Gordon J, prefer the traditional ‘reasonably appropriate

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7 Ibid 180.

8 See, for example, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 330-2 [338]-[339] (Callinan J); *Monis v The Queen* (2013) 249 CLR 92, 181-4 [244]-[251] (Heydon J).


11 As Sir Anthony Mason has recently observed, this is the form of proportionality which commonly involves four stages of analysis: proper purpose, rational connection, necessity and balancing. See Sir Anthony Mason, ‘The use of proportionality in Australian constitutional law’ (2016) 27 *Public Law Review* 109, 111.


and adapted’ formula established in early implied freedom cases, and consolidated in *Australian Broadcasting Corporation*\(^{16}\) and *Coleman v Power*.\(^{17}\) While some have maintained that the ‘differences amongst these formulations are unlikely to be significant’,\(^{18}\) others assert that they mark a significant divergence in approach\(^{19}\) and cannot be assimilated.\(^{20}\)

The aim of this chapter is to critically evaluate the three key approaches which have emerged in recent cases. To that end, the chapter begins in Section II by tracing the key characteristics of the implied freedom set down in the early cases in which the implication was first made. It then goes on in Section III to discuss recent approaches to deciding implied freedom cases, including structured proportionality, from a critical perspective and in light of the theoretical framework established in Part I of this thesis. In Section IV, the chapter applies the theoretical framework to address the criticisms of structured proportionality that have been made in recent cases. Section V concludes by considering when it might not be appropriate to employ structured proportionality in implied freedom cases and provides a theoretically grounded explanation for this position.

### II. EARLY IMPLIED FREEDOM CASES

#### A. Essential characteristics of the implied freedom

As mentioned above, the implied freedom was first recognised in two cases for which reasons were handed down on the same day in 1992: *Nationwide News Pty*
followed immediately by Australian Capital Television Pty Ltd v Commonwealth (‘ACTV’). In Nationwide News, the Court was concerned with the validity of s 299(1)(d)(ii) of the Industrial Relations Act 1988 (Cth), which prohibited the publication of ‘words calculated...to bring a member of the [Industrial Relations] Commission... into disrepute’. In holding the provision invalid, four justices – Brennan J, Deane and Toohey JJ and Gaudron J – found it necessary to imply a freedom of political communication into the Australian Constitution. A similar approach was taken by a slightly different majority in ACTV. At issue in that case was the validity of amendments to the Broadcasting Act 1942 (Cth) purporting to ban all political advertising on television and radio during election periods. A majority of the Court held the amendments invalid, with Brennan and McHugh JJ partially dissenting and Dawson J entirely dissenting in the result. It is necessary to begin our discussion with these early cases since it is in these that we find some of the critical characteristics of the implied freedom were defined. These characteristics continue to have a bearing on how the analysis does, or ought to, proceed in respect of the implied freedom.

i. The implied freedom has force as a constitutional limit

The first two characteristics apparent in these early judgments, and which seem obvious now but which were contentious then, are that the implied freedom has constitutional force and that it is capable of operating as a limit on governmental power. Although we might in some senses identify these characteristics separately, their justification is intertwined and so the discussion that underpins both of them cannot be sensibly deconstructed in respect of each. Essential to both was the insistence by the majority justices that the implied freedom was not derived aliiunde, as the discarded doctrine of reserved powers had been, but was rather to be found (or ‘revealed’ or ‘uncovered’) in the text and structure of the Constitution itself. In forming the view that the structure of the Constitution could be the source of an

22 (1992) 177 CLR 106.
23 Ibid. The majority was this time comprised of Mason CJ, Deane, Toohey and Gaudron JJ, who all held that the law was invalid on the basis that it infringed an implied freedom of political communication.
25 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, 42 (Brennan J).
implication, the majority referred to earlier implications from that same source.\textsuperscript{26} For example, grounded in the Constitution’s federal structure, the principle had been implied in \textit{Melbourne Corporation v Commonwealth}\textsuperscript{27} that Commonwealth laws could not be inconsistent with the continued existence of the States or their capacity to function as such. Similarly, based on the separation of powers, it had been implied that the judicial power of a Chapter III court could not be exercised by a body other than such a court. For Brennan J, in particular, an implication could be found when it was \textit{necessary} to make it in order to give effect to the Constitution,\textsuperscript{28} and the implied freedom was necessary to give effect to the system of representative and responsible government prescribed by the Constitution.\textsuperscript{29} Although there was no basis for the implication of ‘general guarantees of fundamental rights and freedoms’, freedom of political communication was different because it was indispensable to the constitutional system of accountability and responsibility.\textsuperscript{30}

Since the implied freedom flowed from one of ‘the doctrines of government upon which the Constitution as a whole is structured and which form part of its fabric’,\textsuperscript{31} the legislature could not simply override it. Parliament was ‘incompetent to alter the principles prescribed by the Constitution to which it owes its existence.’\textsuperscript{32} The implied freedom therefore had constitutional force and could, in some circumstances, operate as a restriction on exercises of legislative power sourced in express provisions of the Constitution.

\textsuperscript{26} \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ); \textit{ACTV v Commonwealth} (1992) 177 CLR 106, 134-5 (Mason CJ).
\textsuperscript{27} (1947) 74 CLR 31, 78-82 (Dixon J).
\textsuperscript{28} \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1, 41-2 (Brennan J). On this point, Mason CJ, who thought that necessity might only be required where the implication was made from structural rather than textual features of the Constitution, appeared to disagree: \textit{ACTV v Commonwealth} (1992) 177 CLR 106, 135 (Mason CJ).
\textsuperscript{29} \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ).
\textsuperscript{30} \textit{ACTV v Commonwealth} (1992) 177 CLR 106, 138 (Mason CJ).
\textsuperscript{31} \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1, 69 (Deane and Toohey JJ).
\textsuperscript{32} Ibid 47 (Brennan J).
ii. The implied freedom is not absolute

While the implied freedom had constitutional force, it did not, however, operate to defeat exercises of express power absolutely.\textsuperscript{33} Thus, a law could restrict the implied freedom where the law was ‘enacted to fulfil a legitimate purpose and the restriction is appropriate and adapted to the fulfilment of that purpose’\textsuperscript{34} or where it did not constitute a ‘burdensome interference’\textsuperscript{35} or where it was enacted ‘to secure some end within power in a manner which, having regard to the general law as it has developed…is reasonably appropriate and adapted to that end’.\textsuperscript{36} The implied freedom was in this way not an ‘uncontrolled licence to say or write anything at all about matters relating to the government of the Commonwealth’.\textsuperscript{37}

The justification for designating the implied freedom as non-absolute was not a topic of lengthy discussion. However, we might glean from the judgments of Mason CJ and Gaudron J in \textit{ACTV} that foremost in the judges’ minds was a concern regarding accommodation of existing laws that quite clearly could be said to burden the implied freedom but which pre-dated its recognition in 1992. Gaudron J thus referred to the ‘general law’ as containing regulation of defamation, sedition, blasphemy, obscenity and offensive language. All of these, in her Honour’s view, were ‘consistent with the freedom of discourse’.\textsuperscript{38} Mason CJ referred to the guarantee of freedom of communication, speech or expression as ‘but one element, although an essential element, in the constitution of “an ordered society” or a “society organized and controlled by law”’. It could not, therefore ‘necessarily prevail over competing interests of the public’.\textsuperscript{39}

iii. The implied freedom is not defined in the abstract

Finally, the majority justices did not attempt to define the contours of the implied freedom in the abstract. Some attempts have been made from time to time to set out

\begin{footnotes}
\begin{enumerate}
\item Ibid 50 (Brennan J), 76 (Deane and Toohey JJ), 94-5 (Gaudron J); \textit{ACTV v Commonwealth} (1992) 177 CLR 106, 142 (Mason CJ).
\item \textit{Nationwide News Pty Ltd v Wills} (1992) 177 CLR 1, 50 (Brennan J).
\item Ibid 76 (Deane and Toohey JJ).
\item Ibid 95 (Gaudron J).
\item Ibid (1992) 177 CLR 1, 76 (Deane and Toohey JJ).
\item \textit{ACTV v Commonwealth} (1992) 177 CLR 106, 217 (Gaudron J).
\item Ibid 142 (Mason CJ).
\end{enumerate}
\end{footnotes}
its precise content. In *Nationwide News*, Deane and Toohey JJ formed the view that representative government provided for governmental control by ‘two electoral processes’ – elections and constitutional amendment – each exercisable by ‘direct vote’\(^\text{40}\). However, they later took a much more philosophical approach, positing that ‘…the doctrine of representative government which the Constitution incorporates is not concerned merely with electoral processes…the central thesis of the doctrine is that the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth.’\(^\text{41}\) Their Honours declined to decide how far the freedom extended in its protection of ‘political’ communication or whether it applied to State as well as Commonwealth legislation.\(^\text{42}\) Similarly, Brennan J acknowledged that the freedom was not capable of being defined in the abstract:

> To say that freedom to discuss governments and political matters is essential to the existence of representative democracy is not to define with any precision the limitation on legislative power implied in the Constitution. A freedom of the kind postulated leaves open to debate the extent to which that freedom can be trenched upon in order to protect other interests…\(^\text{43}\)

In *ACTV*, Mason CJ observed that ‘[u]nlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or its workings’.\(^\text{44}\) Gaudron J speculated that the ‘notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association and, perhaps freedom of speech generally’.\(^\text{45}\) However, beyond this kind of general speculation none of the justices attempted a definitive articulation of either representative and responsible government or the scope of the implied freedom, and in subsequent cases, we find that definitions have continued to elude the Court.

\(^{40}\) *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ).
\(^{41}\) Ibid 70 (Deane and Toohey JJ).
\(^{42}\) Ibid 75-6 (Deane and Toohey JJ).
\(^{43}\) Ibid 50.
\(^{44}\) *ACTV v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ)
\(^{45}\) Ibid 212 (Gaudron J)
From the above analysis, we can see that in the early cases in which the implied freedom was first recognised as a constitutional limit on legislative power, the Court was also recognising that it had certain characteristics which framed its operation within the constitutional system. Although this chapter will return to this discussion in Section III, we can already see that the hallmark characteristics of the balancing problem set out in Part I of this thesis were present even in the very earliest cases on the implied freedom.

B. Balancing in early cases

Although an express connection was not made between the two, most of the judges who were involved in describing the characteristics of the implied freedom discussed above also accepted that constitutional challenges based on the freedom would involve a balancing of competing interests. In *Nationwide News*, for example, Brennan J postulated that the balancing of the protection of other interests against the freedom to discuss governmental and political matters was ‘under our Constitution, a matter for the Parliament to determine and for the Courts to supervise.’\(^{46}\) The task of judicial review in this context was to decide whether the ‘balance struck by the Parliament’ was ‘within or without the range of legitimate legislative choice’.\(^{47}\) Similarly, Deane and Toohey JJ were of the view that the impugned law could not ‘be justified as being, on balance, in the public interest…’\(^{48}\)

For Mason CJ in *ACTV*, assessing whether the restrictions on the implied freedom imposed by the impugned legislation called for ‘a balancing of the public interest in free communication against the competing public interests which the restriction is designed to serve’.\(^{49}\) Thus ‘an appropriate weighing of the respective interests’ was required.\(^{50}\) Like Brennan J in *Nationwide News*, Mason CJ also related the balancing exercise to the Court’s supervisory role:

> In weighing the respective interests involved and in assessing the necessity for the restriction imposed, the Court will give weight to the legislative judgment on these issues. But, in the

\(^{46}\) *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50 (Brennan J).

\(^{47}\) Ibid 52 (Brennan J).

\(^{48}\) Ibid 78 (Deane and Toohey JJ).


ultimate analysis, it is for the Court to determine whether the constitutional guarantee has been infringed in a given case.\footnote{ACTV v Commonwealth (1992) 177 CLR 106, 144 (Mason CJ).}

Both judges also recognised that the balancing process would need to respond to the nature and degree of the burden imposed and therefore the degree of justification required in any given case. Thus, for example, where a restriction on communication targeted an idea or information directly, a more compelling justification might be required to warrant the imposition in the implied freedom. On the other hand, where a law only regulated the \textit{mode} of communication rather than its content, the strength of the justification needed for the law to survive validity would not be as demanding.\footnote{Ibid 143 (Mason CJ).} These factors would, however, be taken into account within the weighing process not outside it.\footnote{Ibid.}

While these justices were content to explicitly acknowledge the role of balancing, for others it was rather more implicit in their judgments. For example, McHugh J in \textit{ACTV} considered that legislation that restricted ‘the right of the people to participate in the federal electoral process’ might be constitutionally impermissible unless ‘some compelling justification for its enactment’\footnote{Ibid 233 (McHugh J).} could be established. In other words, on balance, the importance of the purpose behind the legislative restriction would need to outweigh the structural role of the implied freedom in maintaining the constitutionally prescribed federal electoral process. Similarly, also in \textit{ACTV}, Deane and Toohey JJ placed emphasis on justification as the essential consideration. Again, however, this emphasis cannot be logically divorced from an underlying balance being drawn between competing interests.\footnote{Ibid 169 (Deane and Toohey JJ): ‘A law prohibiting or restricting political communications by reference to their character as such will be consistent with the prima facie scope of the implication only if, viewed in the context of the standards of our society, it is justified as being in the public interest for the reason that the prohibitions and restrictions on political communications which it imposes are either conducive to the overall availability of the effective means of such communications or do not go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society.’}
C. Resistance to balancing

On the other hand, Dawson J displayed considerable hostility towards notions of balancing entirely. In *Nationwide News*, Dawson J did not engage with the implied freedom at all, basing his decision on the lack of sufficient connection between the impugned law and a head of power,\(^{56}\) but in *ACTV*, his Honour did not resist the implication entirely. Nonetheless, in his Honour’s view, it was ‘not for the Court to express any view whether the legislation goes far enough or further than is necessary to achieve its object’. For Dawson J, these were ‘matters for Parliament and not the Court’.\(^{57}\)

One explanation for this limited view of the Court’s role is that the interpretive path taken by his Honour towards the implied freedom was distinct, in the sense that his Honour eschewed the notion that there was a general freedom of communication that could operate to ‘confer rights upon individuals or to limit the legislative power of the Commonwealth’.\(^{58}\) Instead, Dawson J preferred a much narrower implication based on specific provisions of the Constitution, including ss 7 and 24, which provided for direct popular election, and s 62 and 64, which established responsible government. Although these provisions provided for representative and responsible government, they also left much to Parliament ‘concerning the details of the electoral system to be employed in achieving representative democracy’.\(^{59}\) On that basis, legislation that sought to deny electors access to ‘the information necessary for the exercise of a true choice’\(^{60}\) at elections would be incompatible with the Constitution. However, the implication could go no further and questions of whether ‘the legislation ought to be regarded as desirable or undesirable in the interests of free speech or even representative democracy’ were not, his Honour’s view, for the Court.\(^{61}\)

Whether or not there was a consistent internal logic to it, this arguably narrower implication more readily lent itself to being applied as an ‘absolute’ form of

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\(^{56}\) *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 91 (Dawson J).


\(^{58}\) Ibid 184 (Dawson J).

\(^{59}\) Ibid 185 (Dawson J).

\(^{60}\) Ibid 187 (Dawson J).

\(^{61}\) Ibid.
protection, negating the need for balancing to be undertaken. This reading of Dawson J’s approach is supported by his observations in the later case of *Theophanous v Herald & Weekly Times Ltd.* There, his Honour once again denied the role of balancing:

> The Constitution does not contain any guarantee of freedom of speech or freedom of communication, save for s. 92. There is no call for the Court to identify those exceptions which in the interests of an ordered society (or representative government) must be made to any such guarantee; it does not exist. And so no balancing process is confided to the Court. True it is that the Court may be called upon to decide whether a law impedes freedom of communication in a way which conflicts with the minimal requirements of the Constitution regarding representative government. But that is a very different exercise. If a law interferes with the essential elements of representative government, it is beyond power, regardless of any justification. No balancing process occurs.

We might consider Dawson J’s approach, as his Honour explained it, in light of the theoretical framework established in Part I of this thesis. The need for balancing did not arise, in Dawson J’s view, because the balancing problem did not arise. A vision of the implied freedom as operating absolutely like a ‘trump’ negated the need for any evaluative balancing to be conducted by the Court.

However, while Dawson J’s approach worked within the theoretical framework he sought to establish, it did not work in his actual decision-making. Thus, in *ACTV*, after acknowledging that the impugned laws would have some impact on the system of direct election established even on a narrow version of the implied freedom, his Honour held that the law was nevertheless constitutionally ‘compatible’ because it was seeking to ‘enhance rather than impair the democratic process’. There is no way to read this other than to acknowledge that Dawson J was justifying the burden on the implied freedom by reference to the law’s purpose: a balancing exercise. We might say that this inconsistency between theory and practice sowed the seeds for much of the confusion and disagreement to follow in this area of law.

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63 Ibid 193 (Dawson J).
D. Confusion and disagreement

By the time the unanimous decision in *Lange v Australian Broadcasting Corporation*65 was handed down the Court had moved, arguably under the influence of arguments made by McHugh J in intervening cases,66 to endorse a more narrow view of the implied freedom derived strictly from the ‘terms’ of the Constitution only.67 The quid quo pro appears to have been that Dawson and McHugh JJ would, in turn, join the remainder of the Court in applying a unified approach to deciding implied freedom cases. Under this approach, the essential questions to be asked were set out as follows:

…the [implied] freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.68

Over time, the ‘conditions’ set down above have become encased in what are known as the two ‘limbs’ of *Lange*. Under the first limb, the Court asks whether the impugned law effectively burdens the implied freedom in its terms, operation or effect. If the answer is yes, the Court then proceeds to the second limb, the components of which reflect the passage above. Thus, the Court asks whether the law is seeking to achieve a legitimate end which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and then proceeds to ask whether the law is reasonably appropriate and adapted to achieving that legitimate end.69

65 (1997) 189 CLR 520.
66 In *McGinty v Western Australia* (1996) 186 CLR 140, for example, McHugh J had criticised the majority approach to the implied freedom which had been taken in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 as leading to situation in which ‘the text and structure of the Constitution have receded into the background and it is the concept of representative democracy, not the text or structure of the Constitution, that governs the application of the Constitution in such cases’: at 234.
67 Stone, above n 19, 669, 674-5.
69 See, for example, *Coleman v Power* (2004) 220 CLR 1, 50-51 (McHugh J).
The unanimous Court in *Lange*, including Dawson J, openly acknowledged that the ‘reasonably appropriate and adapted’ had been referred to by some as ‘proportionality’, and that there was no need to distinguish between these concepts. It seemed, then, that perhaps Dawson J had decided to take a fresh approach to implied freedom cases. Ultimately, his position was not made clear in *Lange* itself, however, as it was a case about the implied freedom and the common law rather than the validity of a legislative provision.

In *Levy v Victoria*, Dawson J seemed to return to his hesitations regarding balancing. Although he accepted that balancing might apply with respect to s 92 despite that guarantee being expressed in absolute terms, he did not think the implied freedom warranted the same approach. The same dissonance that could be seen in his Honour’s judgment in *Nationwide News* between theory and practice was again apparent. Dawson J went on to apply a notion of ‘reasonableness’ in a manner that can only be described as a balancing of the relevant competing interests:

> While the plaintiff may have been prevented from making his protest in a manner which would have achieved maximum publicity and to that extent the regulation in question may have curtailed freedom of communication to a degree, it was to a degree which was reasonable in an orderly society and hence consistent with the free elections which the Constitution requires.

Acceptance, or even acknowledgment, of balancing as a necessary interpretive step was next challenged some years later by McHugh J in *Coleman v Power*. In her highly influential article on the implied freedom, Professor Stone had asserted that the analysis endorsed in *Lange*, including by McHugh J, involved ‘ad hoc balancing’ even though the Court was not, generally, acknowledging this in an explicit way:

> … it is clear that the balancing of the interests pursued by the law against that pursued by the freedom does form part of its analysis. The ‘balancing’ process is certainly performed as part of the consideration of less drastic means…in considering the availability of less restrictive

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70 (1997) 189 CLR 579.
71 Ibid 608 (Dawson J).
72 Ibid 607 (Dawson J).
means the Court is really considering whether the means actually used to achieve a particular end, given the alternatives. Therefore, what the Court is really doing is considering a specific aspect of the larger question, whether the end pursued is worth the restriction imposed.75

As discussed in Chapter 2 of this thesis, means ends analysis was used in Prussian administrative law as a proxy for direct balancing between competing interests, supporting Professor Stone’s evaluation of the position in Australian law. In Coleman v Power, however, McHugh J referred directly to Professor Stone’s article and emphasised that in his view ‘no question of ad hoc balancing [wa]s involved’.76 Rather, the question was one of whether the law (the means) and the purpose of the law (the end) were ‘compatible’ with the ‘maintenance of the system of representative and responsible government established in the constitution’.77

What is puzzling about McHugh J’s analysis is that it does not explain how questions of compatibility might be resolved without balancing.78 If the question of compatibility arises only after the first limb of Lange has been satisfied in the affirmative (that is, it has already been concluded that the impugned law burdens the implied freedom at least to some extent), then the law is already incompatible to some degree. All that can occur to save the law’s validity is that the Court can be satisfied that the degree of incompatibility is justified. Despite McHugh’s scepticism, this much is even reflected in his Honour’s own reasoning. As in Dawson J’s judgment in Levy, the balancing analysis was hidden behind reference to the concept of ‘reasonableness’:

…the Constitution’s tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means.79

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75 Stone, above n 19, 681-2. Professor Stone identified Mason CJ’s judgment in ACTV v Commonwealth (1992) 177 CLR 106 as the only exception to the High Court’s lack of explicitness in recognising the role of balancing in implied freedom cases, however from the above analysis we can see that express acknowledgment was also made by Brennan J.
77 Ibid 49-50.
78 For further arguments regarding the deficiencies in this approach, see James Stellios, Zines’ The High Court and the Constitution (Federation Press, 6th ed, 2015) 589.
III. MODERN APPROACHES

It could be said that a modern era in implied freedom jurisprudence is currently underway: between 2011 and 2017, no less than eight challenges were in commenced in the High Court’s original jurisdiction on the basis of the freedom. On one level, these cases have confirmed the authority of *Lange v Australian Broadcasting Corporation*. It has become an orthodox and largely undisputed position that implied freedom cases are broadly to be resolved by addressing the two limbs of *Lange*: does the impugned law burden the implied freedom, and, if so, is it reasonably appropriate and adapted to achieving a legitimate end?

However, while there might be broad agreement as to the relevance of the *Lange* tests, considerable disagreement has arisen as to how the Court might go about answering the questions raised by them. Indeed, a trifurcation of approaches has emerged, and at its heart is a divergence of views as to the appropriate role of the judiciary in this area, and therefore of methods such as balancing. In this sense, the modern jurisprudence has not left behind the tensions that were evident in the early cases.

Some have suggested that there may not be much practical difference between the competing approaches. However, in recent cases proponents of each approach have signalled that they see their positions as increasingly entrenched and irreconcilable. For example, those in favour of structured proportionality have expressly dismissed the relevance of a calibrated approach. On the other hand, those who prefer other approaches have described proportionality as ‘at best an ill-fitted analytical tool’ which has ‘taken on a life of its own.’

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81 Adrienne Stone has observed that there have always been ‘two different approaches’: Stone, above n 19, 676.

82 Blackshield, above n 18, 254; Stellios, above n 78, 591.


84 Murphy v Electoral Commissioner [2016] HCA 36, [101] (Gageler J). This was not an implied freedom case, but rather a franchise case. Nonetheless, comments made in the case are instructive in relation to method as there is much commonality between the implied freedom and the implied right to vote: both are derived from the system of representative and responsible government established by the Constitution and have been recognised as limits on legislative power.
section, the three competing approaches are considered in an effort to understand their true commonalities and differences.

A. Lange unmodified

Since her elevation to the High Court in June 2015, Gordon J has presided over two challenges in the area of the implied freedom: *McCloy v New South Wales* and *Brown v Tasmania*. In both cases, her Honour has made clear that she sees no need to further develop the tests established in *Lange v Australian Broadcasting Corporation*. Indeed, for Gordon J, the two limbs of *Lange*, including the two branches of the second limb, were sufficiently principled to guide judicial decision-making in this area and had been applied ‘without apparent difficulty’ since that decision was handed down.

While the two limbs called for judgment that might lead to a difference in opinion, these judgments were capable of being made using ‘known questions and tools’ and ‘accepted methods of reasoning and analysis’. One of those methods, Gordon J conceded, was means ends analysis. Her Honour opined that in addressing the second limb of *Lange* it ‘may’ be appropriate to ask whether there exist any ‘alternative, reasonably practicable and less restrictive means of achieving the same end which are obvious and compelling’. The requirement that the alternative means be ‘obvious and compelling’ would ensure that the courts do not exceed their ‘constitutional competence by substituting their own legislative judgments for those of parliaments’. In that sense, it would operate as a fixed standard of judicial restraint.

On the other hand, in a stance reminiscent of those adopted by Dawson J and McHugh J in the early cases, Gordon J rejected the role of ‘ad hoc balancing’ in the process of answering the second limb of *Lange*. Her Honour described ‘ad hoc balancing’ as ‘measuring the value of the means (the burden of the provision)
against the value of the end (the legitimate purpose). Her Honour likened this kind of analysis to ‘proportionality’ as undertaken ‘in overseas constitutional contexts’. Justice Gordon was of the view that there were ‘no criteria or rules’ by which such a balance could be struck and it would not be permissible to answer the question on the basis of a ‘value judgment’. Thus, the relevant question was instead one of ‘judgment about the nature and extent of the effect of the impugned law on the maintenance of the constitutionally prescribed system of representative and responsible government’.

As there was with Dawson J and McHugh J, there is an inescapable disjuncture between Gordon J’s apparent disavowing of a need to balance and the way in which her Honour’s analysis actually proceeded in the cases. In the end, in McCloy her Honour concluded that the legislative caps on political donations imposed only a ‘slight’ burden on the implied freedom. On the other hand, the provisions had a number of virtues in respect of the objects they were pursuing:

…Div 2A arguably maintains and enhances the implied freedom. It seeks to prevent corruption and the appearance of corruption by restricting large contributions that could be given to secure a political quid pro quo. Division 2A seeks to prevent patronage, undue influence or buying access (or the appearance of them) by restricting large contributions. And Div 2A works to ensure that the rights of individuals are secured so that each individual has an equal share, or at least a more equal share than they would otherwise have, in political power. These effects may be seen not to distort and corrupt the political process, but to enhance it.

On the basis of these two conclusions – that the burden was slight and the objectives were overwhelmingly positive for the system of representative government – Gordon J concluded that the law was ‘reasonably appropriate and adapted to a legitimate end’. It is difficult to appreciate that this could be anything other than a balancing exercise. Had the burden imposed by the law been just as slight and its purpose malevolent in some sense, one could hardly imagine that Gordon J would

92 Ibid 287 [336] (Gordon J).
93 Ibid 288 [339] (Gordon J).
94 Ibid 287 [336] (Gordon J).
97 Ibid 290 [344] (Gordon J).
98 Ibid 290 [345] (Gordon J).
have reached the same conclusion. Similarly, had the burden on the freedom been extreme, while maintaining the same purposes, Gordon J’s final conclusion also might have been different. No matter how it is viewed, Gordon J’s approach in *McCloy* involved balancing the value of the purpose being pursued by the law against the extent of the burden it placed on it.

**B. Calibrated scrutiny**

Justice Gageler’s approach, developed over a slightly longer line of cases, shares considerable commonalities with that of Gordon J, particularly in seeing *Lange v Australian Broadcasting Corporation* as the touchstone for analysis in this area without the need for further modification to the tests.99 However, his Honour’s approach is also distinct in at least one critical respect. Unlike Gordon J, Gageler J does not expressly deny the role of balancing in implied freedom cases.100 Rather, his Honour appears to hold the view that it should not be carried out in an ‘open-ended’ way, without guidance as to ‘how the incommensurables to be balanced are to be weighed or how the adequacy of their balance is to be gauged’.101 His Honour suggests that the analysis should be conducted instead in a principled manner, tied to what we might describe as a substantive theory of judicial restraint.102 Indeed, under Gageler J’s ‘calibrated scrutiny’ approach, the whole of the analysis,
not just strict balancing, would be conditioned by a principled understanding of the role of the courts within the constitutional system of government.\textsuperscript{104}

In \textit{McCloy v New South Wales}, Gageler J set out his explanation for this view. His Honour began by recounting the central importance of the system of representative and responsible government to the design of the Constitution by its framers. There had been a deliberate choice by them to select a system the ‘great underlying principle’ of which was that ‘the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power’.\textsuperscript{105} That is, a system underpinned by representative democracy and accountability of the executive to the people through Parliament.

This ‘democratic principle’ holds two implications for constitutional jurisprudence. The first is that it makes it necessary to imply into the Constitution a freedom of political communication. As recognised in the early cases on the implied freedom, discussed above, electoral choice is fundamental to the system selected by the framers, and electoral choice requires free communication on political matters to support it. Paradoxically, Justice Gageler added, ‘communication of information relevant to the making of an informed choice is peculiarly susceptible to being restricted or distorted through the exercise of legislative or executive power precisely because the exercise of legislative or executive power is subject to the ultimately controlling influence of electoral choice.’\textsuperscript{106} This susceptibility poses a risk to the system of government established by the Constitution necessitating some protection against the realisation of that risk.

The second implication from the democratic principle concerns the precise role of the judiciary in protecting against risk to the system of representative and responsible government. Justice Gageler acknowledged that the judiciary, with its independence, was ‘uniquely placed to protect against that systemic risk’.\textsuperscript{107} However, in light of the framers’ selection of representative democracy as the

\textsuperscript{104} Ibid 237-8 [149]-[150] (Gageler J).
\textsuperscript{105} Harrison Moore, The Constitution of the Commonwealth of Australia (John Murray, 1902) 329.
primary ‘mechanism of accountability’ in the Australian system, his Honour considered that the supervisory role of the courts should be ‘limited to safeguarding’ that very system. Thus, while his Honour conceded that judicial supervision in this context was ‘vital’, Gageler J also emphasised that it was also ‘necessarily limited’.109

Judicial restraint, in Gageler J’s view, is best expressed by giving due consideration to the reasons for which the implied freedom has been implied into the Constitution in the first place. In turn, ‘fidelity to the reasons for the implication’ are ‘best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the Constitution’.110 Thus a law which poses a greater risk would warrant a more demanding degree of scrutiny, or standard of review, than one which poses a lesser risk. In other words, the degree of justification demanded to establish a law’s validity would need to be ‘calibrated to the nature and intensity of the burden’ that it imposed on the implied freedom.111 In this way, judicial review would only be as intense as it needed to be in order to preserve the constitutionally mandated system of representative and responsible government.

Justice Gageler acknowledged that existing categories, such as content-based versus form and manner restrictions on communication, and direct versus indirect regulation,112 might continue to be useful in a given case in identifying systemic risk. However, his Honour was quick to caution that these categories were ‘not complete dichotomies’ and that ‘each distinction may or may not have analytical utility in a particular case.’113 There would be other factors that could possibly have a bearing on the degree of systemic risk posed by particular law. In that sense, Gageler J was, perhaps quite consciously, avoiding the traps that have befallen

110 Ibid 238 [150] (Gageler J).
attempts to rigidly categorise laws in the United States, as discussed in Chapter 5. It seems, therefore, unlikely that Gageler J’s approach will lead to the development of categories that are uncritically recited as rules.\textsuperscript{114}

That Gageler J prefers a more principled and flexible approach to standards of review was confirmed in the more recent case of 	extit{Murphy v Electoral Commissioner}.\textsuperscript{115} The case did not directly engage with the implied freedom of political communication but instead concerned the connected interest of implied voting rights discernible from the constitutionally mandated system of representative and responsible government. The plaintiffs challenged the so-called ‘suspension period’ between the closing of the electoral rolls and the date of the federal election. In responding to the challenge, Gageler J observed that judicial enforcement of the requirements of ss 7 and 24 of the Constitution needed to ‘be sensitive to the inherent strengths and weaknesses of institutional structures’.\textsuperscript{116} In particular, his Honour warned:

Underlying the relationship between judicial enforcement of the requirements of ss 7 and 24 that senators and members be directly chosen by the people, on the one hand, and legislative exercise of the wide and flexible authority conferred by s 51(xxxvi) in respect of qualifications of electors and the conduct of elections, on the other hand, is the inherent potential for that legislative authority to be exercised to exclude from the political process persons whose participation is unwanted by, or inconvenient to, those who currently form majorities in the Senate and the House of Representatives.

On this basis, stricter scrutiny would be warranted in cases where an exclusion from the franchise was newly instituted or expanded, particularly when they operate to ‘freeze out of the political process discrete minority interests’.\textsuperscript{117} The parallels between this approach and John Hart Ely’s representation-reinforcing theory, discussed in Chapter 4, are difficult to ignore. Indeed, the apparent connection is even clearer when regard is had to Gageler J’s extra-judicial writings published before his appointment to the High Court. In an article published in 2009, in which

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\item \textsuperscript{114} This appears to have been Hayne J’s concern in 	extit{Monis v The Queen}: ‘the strength of the principles established in 	extit{Lange}, and of proportionality reasoning more generally, is the transparency that they bring to decision-making. That transparency must not be obscured by resort to labels.’ (2013) 249 CLR 92, 147 (Hayne J).
\item \textsuperscript{115} [2016] HCA 36.
\item \textsuperscript{116} Ibid [93] (Gageler J).
\item \textsuperscript{117} \textit{Murphy v Electoral Commissioner} [2016] HCA 36, [107] (Gageler J).
\end{itemize}
\end{flushleft}
Gageler J set down his vision for Australian constitutionalism, his Honour wrote of Ely’s theory:

The thesis in its most generalised form is that the Constitution of the United States places its essential trust in the democratic institutions of government and that the role of the judicial power is appropriately to respect such outcomes as are rationally open to those democratic institutions save in those cases where the representative and majoritarian characteristics of those democratic institutions themselves give rise to a danger of abuse. A stricter form of judicial scrutiny is therefore warranted, for example, under the First Amendment where governmental action in any way affects participation in the political process and under the Fifth and Fourteenth Amendments where governmental action adversely affects a discrete and insular minority. 118

Of course, as discussed in Chapter 4, Ely’s theory has been subject to significant criticism since it was first published. The most relevant for present purposes is that – as a restrictive institutional approach to judicial restraint – the theory offers a sound basis conditioning the judicial role based on a single characteristic only: the reinforcement of a representative system of government. Like other restrictive institutional theories, by focusing on a single aspect, Ely’s theory fails to capture the full spectrum of factors that might shape the assessment of relative institutional competency and legitimacy in a given case. 119

The implications of this approach are discernible in Gageler J’s reasoning too. His Honour has equated ‘the degree of justification’ that a particular law demands with the ‘intensity of judicial scrutiny’ to be applied in a particular case. 120 What that approach does not acknowledge, however, is that there may be a host of other factors that also have an impact on the appropriate level of judicial scrutiny (or conversely, restraint) to be applied in a particular case. For example, it may be that in a particular case the Court lacks the evidentiary tools to establish whether there are other equally effective means of achieving the same ends as an impugned law with no collateral effects, such as additional financial costs. In such circumstances, it may be appropriate for the Court to apply less scrutiny of Parliament’s choice than it would do were it merely looking to the nature and degree of burden placed

119 See Chapter 4, Section III.B.
120 Brown v Tasmania [2017] HCA 43, [164].
on the implied freedom. Similarly, a case may arise in which there is very little
certainty surrounding the normative value to be placed on the purpose that a
particular law is pursuing, such as where there is considerable and reasonable
disagreement on the bench as to that value. In such circumstances, it may be more
appropriate for the Court, in assessing whether that purpose is in the ‘public
interest’,\textsuperscript{121} to apply less scrutiny (and more deference) to the value judgment made
by the legislature. These factors are not directly related to the nature and degree of
the burden placed on the implied freedom, but to deny that they would nonetheless
have an influence on the degree of judicial restraint to be applied in a particular case
would be artificial.

Thus, although it may be a more principled and flexible basis for conditioning
judicial restraint than a strict categorisation approach, Gageler J’s approach is still
potentially underinclusive. It is either likely to mask the full set of factors which, in
reality, have a bearing on the assessment, or guide the decision-maker towards a
level of scrutiny that is inappropriate in the full context of the case at hand. These
outcomes do not deny the utility of the theory altogether. However, if applied on its
own, there may be some scepticism as to whether the theory can deliver on Gageler
J’s assertion of enhanced ‘consistency and predictability in the application of the
implied freedom.’\textsuperscript{122}

C. Structured proportionality

In the modern cases on the implied freedom, the role of proportionality has become
increasingly acknowledged and accepted.\textsuperscript{123} Notwithstanding this, \textit{McCloy v New
South Wales} was a significant judgment in this respect. For the first time, a
structured form of proportionality was accepted into Australian constitutional law
by a majority of the High Court. Its integration with existing tests was also made

\textsuperscript{121} \textit{Tajjour v New South Wales} (2014) 254 CLR 508, 580-1 [151] (Gageler J); \textit{Brown v Tasmania}

\textsuperscript{122} \textit{McCloy v New South Wales} (2015) 257 CLR 178, 238 [151] (Gageler J).

\textsuperscript{123} \textit{Monis v The Queen} (2013) 249 CLR 92, 147 [124] (Hayne J), 194-5 [278]-[284], 213-4 [346]-
[347] (Crennan, Kiefel and Bell JJ); \textit{Attorney-General (SA) v Adelaide City Corporation} (2013)
249 CLR 1, 37 [55] (French CJ), 84-6 [202]-[208] (Crennan and Kiefel JJ), 90 [224] (Bell J);
\textit{Unions NSW v New South Wales} (2013) 252 CLR 530, 556 [44] (French CJ, Hayne, Crennan,
Kiefel and Bell JJ); \textit{Tajjour v New South Wales} (2014) 254 CLR 508, 549 [35] (French CJ), 570-
2 [110]-[116], 574-5 [130] (Crennan, Kiefel and Bell JJ); \textit{McCloy v New South Wales} (2015) 257
clear. That position was then confirmed by a slightly different majority two years later in *Brown v Tasmania*.

**i. Structured proportionality is an appropriate and desirable analytical tool**

In *McCloy v New South Wales*, a majority of justices consisting of French CJ, Kiefel, Bell and Keane JJ held that structured proportionality should be used to answer the second limb of *Lange*, and in particular the question of whether the impugned law is reasonably appropriate and adapted to the achievement of a legitimate end. Their Honours held that four tests were relevant:

1. **Compatibility testing:** are the purposes of the law and the mean adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
2. **Suitability:** does the impugned law have a rational connection to its purpose?
3. **Necessity:** is there an obvious and compelling alternative that has a less restrictive effect on the freedom?
4. **Adequate in its balance:** does the importance of the purpose served by the impugned provision justify the restriction imposed on the freedom?

Subject to some qualifications regarding the manner in which it has been implemented which will be discussed shortly, in general the majority's adoption of structured proportionality in the implied freedom context appropriately responds to the constitutional context before it. It is possible to reach this conclusion because, as we have seen since the very earliest cases in this area, the characteristics of implied freedom cases generally satisfy the criteria for a balancing problem. They do so in the following ways:

1. **When a challenge to an impugned statutory provision is brought on the basis of the implied freedom, and a burden on the implied freedom is identified, there exists a conflict of interests.**
2. **Each interest in conflict has a constitutional source.** The implied freedom, on one hand, is derived from the text and structure of the Constitution, and therefore operates as a constitutional limit. On the other hand, the enactment
of legislation – when carried out in sufficient connection with a head of power in s 51 of the Constitution – is an exercise of constitutionally conferred, albeit limited, power.

3. The implied freedom does not operate absolutely to override other rights, interests or obligations embodied in statutory provisions.124

4. The implied freedom – contingent as it is on the more amorphous concept of representative and responsible government – cannot be defined in the abstract.125

As explained in Chapter 3, the presence of these features necessitates an evaluative approach to deciding implied freedom cases that involves a contextual balancing of the interests in conflict, rather than the application of a priori definitional rules. Structured proportionality is one such contextual, evaluative approach.

Arguably, most of those justices who decided the early cases appeared to be cognisant that evaluative, contextual balancing was at the heart of implied freedom cases. Indeed, the discussion earlier in this chapter lends support to this view. Furthermore, it is arguable that the two limbs of the Lange formula have also always reflected the need for such an approach. Indeed, this may have been one of the reasons that a connection between the ‘reasonably appropriate and adapted’ formula and proportionality has continually been made in implied freedom cases126 (the


125 See, for example, Gageler J’s observations in Murphy v Electoral Commissioner: ‘…The Constitution commits to the judiciary, in the last instance, the function of ensuring fidelity to a very large constitutional idea. To attempt to pin it down more tightly would be to fail to grasp its meaning: it defies being diced or squashed to fit within a judicially constructed box…The very nature of the conception enshrined in the language of ss 7 and 24 [of the Constitution] means that the point at which a choice by electors…ceases to be describable as a choice by the people cannot be determined “in the abstract”, must be a “question of degree” and must be a question which “depends in part upon the common understanding of the time”: [2016] HCA 36, [89]-[90]. See also, ACTV v Commonwealth (1992) 177 CLR 106, 156 (Brennan J); Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104, 123-4 (Mason, Toohey and Gaudron JJ).

other being that the same connection was also made in the s 92 context, as discussed in the previous chapter).

What appears to have muddied the waters, and made the introduction of structured proportionality into this area of jurisprudence more controversial than it needed to be, is the assertion by some justices that implied freedom cases could, and indeed should, be conducted without contextual, evaluative balancing. On one level, the assertion was completely understandable. It was driven by a need to apply restraint in an area that could lend itself to judicial overreach – a particularly abhorrent outcome within an overwhelmingly conservative legal culture.

However, as we have seen from the above discussion, the assertion that balancing is avoidable is simply not tenable. Those who have espoused it in theory have not been able to comply with it in practice. Moreover, it appears to have left a legacy of confusion and disagreement as to what the appropriate method for approaching implied freedom cases should be. Over time, the incongruity between theory and practice has led to questions being raised as to exactly what the Lange ‘reasonably appropriate and adapted’ formula actually stands for. It seemed to many to have become a gloss under the surface of which reasoning could become ‘cumbersome and inexact’127 or ‘obfuscated’,128 and important analytical steps could be ‘pronounced as a conclusion[s]’.129

By contrast, as the majority in McCloy v New South Wales stated, structured proportionality ‘provides a uniform analytical framework’130 for conducting the evaluative, contextual balancing that is required in these cases. That structure does not attempt to avoid balancing for fear of trespassing beyond the judicial role. Rather, it addresses those concerns from a different angle: by enhancing predictability and transparency of the reasoning underpinning the factual and

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127 Monis v The Queen (2013) 249 CLR 92, 195 [283] (Crennan, Kiefel and Bell JJ).
130 Ibid.
normative judgments being made. Its staged progression and predictable tests encourage the provision of ‘clear and detailed reasons for any decision as to a law’s validity’. Where such reasons are not provided, it is immediately apparent, aiding the external scrutiny that is critical to judicial accountability. Internal scrutiny is also encouraged. The certainty of the tests aids decision-makers in checking that they have considered the full spectrum of considerations relevant to deciding the case before them in the most robust and rational manner possible.

In addition to aiding the scrutiny function, structured proportionality also encourages a shared understanding to develop between the arms of government. As the majority in *McCloy v New South Wales* suggested, the staged nature of structured proportionality ‘assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for legislative freedom will be tested’. This improves not only the dialogue between the judiciary and the legislature, but also encourages a culture in which providing justification for difficult decisions becomes a general standard for political participation. Although judicial review may police the outer boundaries of legislative authority, within those boundaries the relationship of accountability between the legislature and the people is enhanced by the encouragement of a culture of justification.

### ii. Compatibility testing

While we might say that structured proportionality is in general an appropriate, and even desirable, analytical tool in most cases where the implied freedom is raised to challenge the validity of legislation, there remain some doubts to be addressed. The first of these is in relation to the precise manner in which structured proportionality

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132 Kirk, above n 18, 20.


134 Ibid.

135 Barak, above n 131, 465.

has been implemented in *McCloy v New South Wales*, and specifically the role of what was described in that case as ‘compatibility testing’. A description of this test was given by the majority in *McCloy* in the following terms:

…are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as “compatibility testing”.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.137

The majority applied this compatibility test before proceeding to the suitability, necessity and adequate in the balance (strict proportionality) stages of analysis.

The difficulty with the ‘compatibility test’ as stated in *McCloy v New South Wales* is that it purports to be an assessment of the purpose of a law and the means adopted to achieve it as against the ‘system of representative government’. That is, it requires a balancing of two principles: the interest embodied in the law and the system of representative government. In effect, it therefore replicates the analysis that is undertaken under the structured proportionality stage in addressing the ‘balancing problem’.

Some confusion surrounding the Court’s modification of the *Lange* test in *Coleman v Power* might explain how this situation has arisen. In *Coleman v Power*,138 McHugh J suggested that the second limb of *Lange* should be reframed to test both compatibility of the end of a law and the means used to achieve that end with the system of representative government.139 With the agreement of a majority of Court, the second limb of *Lange* was accordingly amended in *Coleman v Power* to include the words in square brackets:

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139 Ibid 50.
is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?  

It is from this statement that it appears that a number of judges, including the majority in *McCloy*, have formed the view that ‘compatibility testing’ should look to compatibility of a law’s means and ends with the system of representative and responsible government. However, it is relevant to bear in mind that in the above passage McHugh J was referring to the whole of the examination to be undertaken under the entire second limb of *Lange*. Since that limb has now been replaced by compatibility testing and structured proportionality (if one follows the plurality approach in *McCloy*), to conduct an assessment of compatibility of ends and means within both the compatibility testing and structured proportionality stages of analysis is repetitive and redundant.  

This point was, in part, raised by the Commonwealth in *Brown v Tasmania*. The Commonwealth argued that the reference to means should be removed from ‘compatibility testing’ because it required an assessment of the compatibility of the means adopted to achieve a particular purpose before structured proportionality analysis had even been undertaken. The joint justices in *Brown v Tasmania* conceded that the point had been ‘well made’ and dropped the reference to ‘means’ in compatibility testing. Although this must be viewed as a welcome modification, it seems anomalous that the point would be made and accepted with reference to ‘means’ but not ‘ends’, which are also examined at the structured proportionality stage.  

It must be acknowledged that the idea of ‘compatibility testing’ was not a novel invention of the majority in *McCloy*. However, its retention even after structured proportionality had been adopted to do, in effect, the same thing in a more systematised way is difficult to understand. A compelling explanation cannot be

140 Ibid 78 (Gummow and Hayne JJ); 82 (Kirby J).  
142 [2017] HCA 34.  
143 Ibid [104] (Kiefel CJ, Bell and Keane JJ).  
144 Ibid.
found in the weight of precedent. A glance at the historical treatment of the ‘compatibility test’ serves only to reinforce the view that it has always had uncertain content and thus been of dubious value. The reasons produced to address ‘compatibility’ have frequently exhibited highly superficial reasoning,\textsuperscript{145} or even the complete abandonment of reasons in favour of statements as conclusions.\textsuperscript{146} To date, no law has been invalidated for pursuing an end the Court has found to be ‘illegitimate’ or ‘incompatible’ at this stage of analysis. All of this points to the conclusion that the test, as it is currently framed and applied, is of minimal assistance to the Court.

On the other hand, there are ways in which the test could be modified further in order to give it real substance. The first is to acknowledge that ‘legitimacy’ here should actually mean ‘with power to act’. Thus, the threshold test should be checking that an impugned law, on proper construction, is a law with sufficient connection to a constitutional head of power to be properly characterised as a legitimate exercise of legislative power. If a law is not a legitimate exercise of power, there is no point in checking whether a constitutional limit should be applied to it. In effect, this would give the ‘compatibility’ test some substance by introducing a characterisation of laws test into the analysis. Of course, depending on the case, there may be no need to conduct an extensive examination into this question since it is not at issue. Nonetheless, where it is needed, the concept of ‘legitimate’ under the Constitution could be put to use in this way.

The second, and more critical, modification would be to recognise that the reference to the law’s true ‘purpose’ or ‘end’ is, on its own, a substantive inquiry with real importance for the remainder of the analysis. Without undertaking an exercise of statutory construction to determine what the objective purpose of the law is, it is not possible to carry out the analysis required under each of the stages of structured proportionality analysis to follow. For example, it is impossible to answer whether

\textsuperscript{145} See, for example, Attorney-General (SA) v Adelaide City Corporation (2013) 249 CLR 1, 63 [136] (Hayne J).
\textsuperscript{146} Tajjour v New South Wales (2014) 254 CLR 508, 562 [77] (Hayne J), 571 [111]-[112] (Crennan, Kiefel and Bell JJ), 583 [160] (Gageler J). See also the majority’s analysis of legitimate ends: McCloy v New South Wales (2015) 257 CLR 178, 203-9 [31]-[53] (French CJ, Kiefel, Bell and Keane JJ). Only very brief and largely superficial mentions are made of the compatibility of the ‘means’ with the system of representative government at [46] and [53]. These are stated in terms of conclusions rather than reasoned analysis.
a law is suitable in the sense that there is a rational connection between its purpose and the means used to achieve that purpose. It is also impossible to answer whether a law is necessary in the sense that there are no alternative means to achieve the same purpose. Finally, it is impossible to answer whether a law is adequate in its balance in the sense that the importance of the purpose justifies the nature and degree of incursion into the implied freedom. In a demonstration of the centrality of this inquiry, this search for ‘true purpose’ is already taking place in the Court’s analysis.\textsuperscript{147} There would be further benefit in an express acknowledgment of this being the real value of ‘compatibility testing’.

If it is to truly assist the Court’s analysis, compatibility testing should shift away from attempting to resolve whether a law is pursuing a legitimate end in the sense of being ‘compatible’ with the system of representative and responsible government. This question is either almost impossible to answer in a threshold form and, if attempted, replicates the analysis that is to be undertaken under structured proportionality. Rather, the initial stage of inquiry should focus, in cases where characterisation is in issue, on determining whether a law is an authorised (‘legitimate’) exercise of legislative power\textsuperscript{148} and, in all cases, on ascertaining the law’s true purpose. The answers to these two questions will substantively aid the Court’s overall inquiry.\textsuperscript{149}

\textbf{IV. ADDRESSING CRITICISMS OF STRUCTURED PROPORTIONALITY}

The following section turns to examine the criticisms that have been made in recent cases of structured proportionality and its appropriateness to the Australian constitutional context.

\textsuperscript{147} See, for example, in \textit{McCloy v New South Wales} (2015) 257 CLR 178, the references in the majority judgment to ‘true legislative purpose’ (at 203 [32]) and ‘true purpose’ (205 [40]) of the impugned provisions embedded under the heading of ‘Compatibility of the legitimate purpose and means with the Constitution?’.

\textsuperscript{148} At this stage of analysis, if characterisation is in issue, a form of analysis similar to ‘smoking out’ might be of some assistance to the Court in the manner described in Chapter 6.

\textsuperscript{149} Another advantage of such an approach is to return the judicial mind at this stage of analysis to familiar and accepted jurisprudential techniques of purposive statutory interpretation and characterisation, minimising any need to second-guess legislative judgement at such an early stage of analysis.
A. Structured proportionality in the absence of constitutional ‘rights’

In *Brown v Tasmania*, Gageler J emphasised that he did not find structured proportionality ‘to be a particularly useful tool’.\(^{150}\) In support of that conclusion, his Honour made the observation that the structure of proportionality analysis was not ‘tailored to the constitutional freedom of political communication, which is not concerned with rights’.\(^{151}\) The connection between constitutional rights jurisprudence and the appropriateness of structured proportionality analysis, particularly at the last strict balancing stage, was also made by Gordon J. Her Honour observed, that ‘[u]nlike other countries in which “balancing” has been used, Australia does not have a Bill of Rights. The implied freedom of political communication is not a personal right.’\(^{152}\)

As discussed in Chapters 2, 3 and 4, structured proportionality emerged in its modern form in the constitutional adjudication of the German Federal Constitutional Court. From there it has spread to constitutional jurisdictions around the world, almost always being applied in the context of constitutional rights operating as limitations on state action. It seems logical perhaps then to assume that structured proportionality only has application within the framework of constitutional rights adjudication. Without a constitutional bill of rights in Australia, and with the High Court repeatedly emphasising that the implied freedom is not an individual right, it would seem to follow that structured proportionality has no role to play in Australian constitutional law.

However, as observed in Chapter 2, structured proportionality had antecedents in a context where the analysis did not involve constitutionally-entrenched rights: the administrative law of Prussia in the late 19th century. Indeed, the tests that make up structured proportionality were first proposed as a method by which the judiciary could constrain the growing and increasingly powerful administrative state in the absence of a meaningful rights-based constitution. Although the form of proportionality analysis normally employed in that context was an abridged, proxy form where only the connection between means and ends was tested, this was

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150 *Brown v Tasmania* [2017] HCA 43, [159] (Gageler J).
151 Ibid [160] (Gageler J).
152 Ibid [433] (Gordon J).
reflective of the uncertain constitutional legitimacy of the courts conducting judicial review altogether. The full form of structured proportionality analysis, which also included an assessment of the importance of the ends as against the burden on a competing interest, had already been theorised, however, even if the courts lacked sufficient legitimacy to deploy it. This suggests that while structured proportionality might be helpful in modern constitutional rights adjudication, its application is not necessarily limited to that context.

This view gains further support when we examine the similarity between the ‘rights’ to which structured proportionality is applied and the implied freedom. As discussed in Chapter 3, structured proportionality only plays a role once it is accepted that a given ‘right’, even if constitutionally entrenched, does not have any special status vis-à-vis other social interests embodied in, for example, legislation. That is, the view is taken that the right does not operate absolutely as a prima facie ‘trump’ over other legislative interests. If it did operate in this way, then the courts would have little work to do other than to define the right’s scope and declare its absolute operation within that scope. On the other hand, where a right is considered non-absolute and it comes into conflict with some other non-absolute right or interest, if the other characteristics of the balancing problem are present, then the courts must contextually balance the competing rights or interests in order to resolve the conflict. Structured proportionality can offer some assistance in carrying out this exercise in the manner explained in Chapter 3. Since the High Court has repeatedly emphasised that the implied freedom does not operate absolutely, structured proportionality may be just as appropriate in this context as it is in the context of adjudication relating to non-absolute rights.

There is a further, and critical, similarity between constitutionally-entrenched individual rights and the implied freedom. Both find their normative justification in higher order values that are fluid in scope and concept. As such, they cannot be defined in the abstract. For example, the implied freedom draws its justification from the amorphous concept of ‘representative and responsible government’, which no one has successfully defined without reference to concrete factual and normative considerations. This is why definitional approaches that may be well suited to application in most areas of the common law do not work well here. As explained
in Chapter 3, it is also why structured proportionality, which provides areas of discretion to take into account the relevant factual and normative considerations raised by a concrete case is not necessarily inappropriate in the context of the implied freedom simply because the latter is not an individual ‘right’.

**B. Structured proportionality as a constraint on judicial discretion**

In *McCloy v New South Wales*, Gageler J expressed reservations regarding what his Honour saw as the ‘one size fits all’ approach of structured proportionality. His Honour considered that the approach was inappropriate because it attempted to apply ‘standardised criteria… irrespective of the subject-matter of the law and no matter how large or small, focussed or incidental’ the restriction might be’. Justice Gageler expressed similar misgivings in *Brown v Tasmania*. In rejecting the contention that the second limb of *Lange* should always be addressed through the application of structured proportionality, as had been the majority approach in *McCloy*, his Honour stated that constitutional analysis should not be ‘reduced to the application of some pre-determined all-encompassing algorithm’. His Honour was of the view that adhering to the second limb of *Lange* in terms no more elaborate than the way in which the test had been stated in that case (and modified slightly in *Coleman v Power*) would avoid ‘limiting or ordering in advance the considerations which might legitimately bear on the justification for particular constraint’.

Structured proportionality requires courts to engage in particular analytical thought processes, and it also requires that those thought processes be undertaken in a designated sequence. To a degree, it is, therefore, formulaic, and it is understandable that some judges might consider such a method unduly restrictive of judicial discretion.

On the other hand, the analytical processes which make up structured proportionality are not expressed in terms that demand mathematical precision in a manner which warrants labelling as algorithmic or mechanical. Indeed, as was

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154 *Brown v Tasmania* [2017] HCA 43, [161] (Gageler J).
155 Ibid [163] (Gageler J).
explained in Chapters 3 and 4, the stages of proportionality analysis leave considerable room for judicial discretion to be exercised to respond contextually to the circumstances of the case at hand. Chapter 3 explained that the conceptual underpinnings of each of the tests responds to the nature of the balancing problem to which structured proportionality might appropriately be applied. In this sense, the tests are heuristic, intuitive and conceptually sound.

Furthermore, although it may at first seem ritualistic, the order in which structured proportionality proceeds plays an important role in the legitimacy of the method. The tests proceed from the most legalistic and least value-laden (suitability) to the least legalistic and most value-laden (strict proportionality). That order of analysis means that courts can avoid engaging in a level of value-laden decision-making that may be unnecessary in the circumstances of the case at hand. If a case can be decided on more legalistic grounds then this, in turn, lessens concerns regarding the legitimacy and competency of constitutional courts making judgments on the basis of factual and normative inquiries.

Third, the predictability of the structured proportionality tests serves a higher purpose. It allows judges, parties and those scrutinising judgments after the fact to know what to expect. Less energy has to be expended by judges expounding the precise analytical approaches they have applied, less academic ink needs to be spilt scrutinising the veracity of the claims made by judges purporting to have adopted particular analytical approaches, and a shared understanding can be developed between judges and legislators regarding the manner in which the latter’s laws will be judicially tested. Our collective gaze can, therefore, shift from form to substance. The greater and more discerning attention this will bring to the actual value judgments being made can only further serve to quell concerns regarding proportionality’s appropriateness to the Australian constitutional context.

C. Structured proportionality and judicial restraint

In Mulholland v Australian Electoral Commission, Gleeson CJ suggested that the ‘concept of proportionality has… the advantage that it is commonly used in other
jurisdictions in similar fields of discourse. Indeed, commentators have identified this feature as an explanation for the rapid spread of proportionality methodology to constitutional systems around the world. It has been contended that proportionality responds to the ‘need for a common language, a lingua franca, that transcends national borders and allows for dialogue and exchange of information between constitutional systems’. The breadth of structured proportionality permits sufficient variance between constitutional systems to accommodate their particular preferences yet is uniform and stable enough to promote cross-cultural fertilisation and methodological and substantive comparison. However, Gleeson CJ also warned that the ‘concept of proportionality has… the disadvantage that, in the course of such use, it has taken on elaborations that vary in content, and that may be imported sub silentio into a different context without explanation’. The point was elaborated further by Gageler J in McCloy v New South Wales. His Honour observed that the ‘varying degrees of latitude’ that are afforded to governmental acts within proportionality tests are often ‘not articulated but are embedded within the institutional arrangements and practices within which those tests are applied’.

As discussed in Chapter 4, structured proportionality emerged as a compromise between two forces in German constitutionalism: the legal scientific tradition and transformative constitutionalism. The former emphasised judicial restraint and accountability, while the latter saw the judicial role in broader terms as a key transformative institution in the post-war reconstruction of West Germany. Thus, while the staged nature of proportionality reflects the desire in the legal scientific tradition for legalistic rules and structure, within each stage of the analysis sufficient room is reserved for the exercise of judicial discretion to contextually respond to the circumstances of a particular case. In this way, structured proportionality

158 Ibid.
159 Ibid.
provides a framework in which value judgments are encouraged to be carried out openly, not behind obfuscated reasoning or in the absence of any reasoning at all.

On the other hand, the flexibility within structured proportionality means that there is also considerable opportunity to apply it at higher or lower levels of intensity, or standards of review. That is, it is method which is ‘plastic’ and capable of ‘producing an area of discretionary judgment that can be massively broad or incredibly narrow – and anything else in between’. As Gageler J forcefully points out, there is a risk that the standards of review applied within structured proportionality will go unarticulated. This may reduce the external scrutiny that can be applied to the reasons for their selection. It also potentially allows their application to become indistinguishable from the underlying factual and normative judgments that are being made.

If structured proportionality is coupled with a robust theory of judicial restraint, however, and the application of that theory is clearly articulated with reasons, then it seems it may be possible to overcome some of these risks. It may also be possible to bring greater attention to the full spectrum of factors that affect the process of deciding the appropriate level of judicial restraint or scrutiny in a particular case. In this way, structured proportionality might be used to respond contextually to the greater or lesser empirical competency or democratic legitimacy of ‘politically accountable institutions’ in any given case.

Attention must therefore turn to the selection of an appropriate approach to couple judicial restraint with structured proportionality. In McCloy v New South Wales, the approach taken by the majority to the ‘necessity’ stage of analysis was to fix the standard of review at consideration of ‘obvious and compelling’ alternatives only. The justification offered by the majority for setting this fixed standard was to preclude the courts from exceeding ‘their constitutional competence by

162 Rivers, above n 141, 203-4.
164 Jackson, above n 128, 3145.
substituting their own legislative judgments for those of parliaments’. This approach was, therefore, a clear attempt to tailor structured proportionality in Australia in a way that responds to the strict separation of powers between the courts and the legislature established by the Constitution. The approach also deals with some of the practical empirical limitations of courts being faced in other jurisdictions. In Canada, for example, it has been observed that ‘[i]t may simply be impossible to prove with scientific certainty that the means chosen to combat the problem will do so, and that other, less intrusive means to tackle the problem are equally effective’. By fixing the standard at ‘obvious and compelling’, the majority in *McCloy* was in effect attempting to reduce the uncertainty generated by a detailed empirical inquiry.

It might be argued, however, that by fixing a single standard and setting that standard at the high evidentiary bar of ‘obvious and compelling’, the Court is *a priori* weighting its analysis in favour of the legislature. The approach places a burden on the challenger to suggest an alternative that is on its face less intrusive and at least as effective as the impugned law. However, there may well be instances where, although it is not immediately obvious, on a more searching evidentiary examination, there is nonetheless a compelling alternative available. As Ely suggests, there may be cases where there are reasons why the political process has not been conducive to such an alternative becoming law. If those reasons point to distortions in the political process or an undermining of the representative character of the institutions of democracy, then there may well be justification for the Courts to conduct a less deferential and more searching inquiry. Fixing a standard at a high level of deference may therefore be problematic in some circumstances.

Equally, as was argued in the discussion above, adopting an approach to judicial restraint that merely responds to one factor, such as the nature and degree of the burden imposed by the impugned law on the implied freedom or the risk posed to the system of representative and responsible government, can lead to underinclusiveness. Thus, although it may be an improvement on fixed and

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167 Ibid.
168 Sujit Choudhry, ‘So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*s Section 1’ (2005) 34 *Supreme Court Law Review* 501, 524-5.
169 Kirk, above n 18, 8.
invariable standards of review, such an approach is also likely to lead to problems when it is applied over the course of time to the complexities raised by real constitutional cases.

It appears, therefore, that an approach is needed that is both flexible and broad enough to respond contextually to the full range of factors that might influence the application of judicial restraint in a particular case. As discussed in Chapter 4, contextual institutional theories of judicial restraint offer just such an approach. These theories do not attempt to limit the range of circumstances that might be taken into account in a particular case, but merely highlight that the judiciary should respond to higher or lower levels of certainty in a case. Uncertainty can take the form of factual uncertainty, or normative uncertainty. The greater the uncertainty, the greater the case for judicial restraint and deference to institutions like the legislature which may, in the circumstances, have greater empirical competency or democratic legitimacy to deal with that uncertainty.

In Chapter 4, the relatively ordered way in which contextual institutional theories of judicial restraint can also be coupled with the stages of structured proportionality was explained. Where there is greater factual uncertainty faced by a court, then there may be a case for the necessity test to be applied at a higher level of deference. Similarly, where there is greater normative uncertainty, it might be appropriate to apply the strict proportionality test with greater judicial restraint. In both cases, the reasons and the standard that is applied should be articulated such that the underlying factual and normative judgments are clearly discernible from broader institutional considerations.

Without being tied to a robust approach to judicial restraint, there is a danger that in future cases the application of structured proportionality may lead to uncritical recitals of tests that have become divorced from an understanding of the limited but necessary role of the judiciary in carrying out its supervisory function. As Michael Coper once observed, in another context, when ‘rules and principles are divorced from their origins, and acquire a life of their own’, the consequence can sometimes
be the ‘erratic and accidental nature of the growth of judicial doctrine’.

An approach is therefore needed that is mindful of the relative institutional competency and democratic legitimacy of the legislature and the judiciary in the circumstances of a particular case. By making the application of that approach as explicit as possible, it may be possible to address the concerns of those who consider structured proportionality inappropriate in the Australian constitutional context.

V. WHEN IS STRUCTURED PROPORTIONALITY NOT APPROPRIATE?

In the sections above it was argued that, subject to some further development, structured proportionality is generally an appropriate, and even desirable, analytical tool in implied freedom cases. However, even someone with a passing acquaintance with the jurisprudence in the area might question the breadth of that claim. Surely, that person would say, there are implied freedom cases where structured proportionality – or, indeed, any other contextual, evaluative method of balancing – is not an appropriate method? Indeed, it would be correct to raise this concern since there are cases which illustrate that very point. However, armed with a theoretical framework, it is now possible to explain why it is that structured proportionality, while generally appropriate, may not be appropriate in all implied freedom cases.

The explanatory potential of the theoretical framework is illustrated in the following section, which looks at two circumstances in which it has been found that evaluative, balancing approaches such as structured proportionality are not appropriate: where the implied freedom is applied in connection with the common law; and where there is no burden on the implied freedom. It is argued that in each of these cases, at least one of the characteristics of the balancing problem either does not arise on the facts or has been displaced by the operation of some other principle, rendering structured proportionality an inappropriate tool in that context.

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170 Michael Coper, Freedom of Interstate Trade under the Australian Constitution (Butterworths, 1983) 4.
A. The implied freedom and the common law

The relationship between the implied freedom and the common law arose as an issue in a line of cases decided in the 1990s. These cases concerned the common law of defamation, and how the implied freedom might affect the balance struck within it between a right to protection of reputation, on one hand, and a right to speech on the other. The common law balancing exercise proceeded upon ‘an assumption of freedom of speech’ and then a discovery of exceptions to it through the application of precedent, underlying principle, contemporary values, implications of change, and just resolution of the instant case. However, the Court’s task in applying the implied freedom to defamation law was, the Court conceded, quite different. It distinguished what it described as the ‘common law question’ from the ‘constitutional question’ by noting that the latter involved not a balancing exercise between the competing interests but ‘defining the area of immunity’ established by the implied freedom. Thus, even though the implied freedom was not ‘absolute’, it would operate to shape and control the common law:

If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former. It will not always be easy to determine whether and to what extent there is a variance, but it is clear that the Constitution must prevail.

The Court was, in effect, establishing a hierarchical relationship between the common law and the implied freedom. The implied freedom’s constitutional status meant that, in conflicts with common law interests, it would operate to trump those interests. The Court’s conclusion in each of the cases was to adjust the balance that

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174 Ibid 565.

175 Ibid 566 (emphasis added).

had been struck within the common law so that the ‘freedom of speech’ side would be enlarged commensurately with the scope of the implied freedom. Accordingly, the scope of the defences to defamation were increased.\textsuperscript{177} The Court also made clear that this ‘freedom of speech’ side, insofar as it related to political communication, could not be reduced by future developments in the common law because to do so would be to encroach upon the implied freedom. What is important for present purposes is that the Court was not engaged in an evaluative, contextual balancing exercise between the competing interests of political speech and protection of reputation. Rather, it was attempting to define the constitutional rules by which the common law could conduct that exercise, and in doing so to reserve an area of immunity that would operate to trump the common law should it impede political communication.\textsuperscript{178}

The theoretical framework established in this thesis assists us to understand why there is no role for structured proportionality in these kinds of cases. As discussed above, ordinarily when the implied freedom comes into conflict with a statutory provision, the characteristics of the balancing problem are satisfied. One of those characteristics is that both interests in conflict have the same \textit{prima facie} normative ‘constitutional’ status. It is partly this reason why neither interest can operate absolutely to trump the other. However, in conflicts between the implied freedom and the common law, the common law does not have constitutional status and it must ‘of necessity’ yield to the Constitution, including a constitutional implication like the implied freedom.\textsuperscript{179} In such circumstances, the characteristics of the balancing problem are not satisfied, and there is therefore no role for an evaluative, contextual form of balancing analysis. If structured proportionality were to be applied in this context, it would be an inappropriate use of the method.

\textsuperscript{177} \textit{Theophanous v Herald and Weekly Times Ltd} (1994) 182 CLR 104, 137 (Mason CJ, Toohey and Gaudron JJ); \textit{Lange v Australian Broadcasting Corporation} (1997) 189 CLR 520, 573 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

\textsuperscript{178} Questions might be raised as to whether the courts can ever be successful in defining the ‘scope’ of a right that has an abstract quality to it and therefore whether application of a definitional approach would ever truly be successful in this context. However, resolving this conundrum and coming up with a better approach in such circumstances is outside the scope of this thesis. The point that is being made here is simply that structured proportionality is not an appropriate analytical tool either.

\textsuperscript{179} \textit{Lange v Australian Broadcasting Corporation} (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
The Court observed that the common law of defamation had reached a point where it had failed to meet the constitutional requirement that “the people” be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw a light on the performance of Ministers of State and the conduct of the executive branch of government.\textsuperscript{180} Accordingly, the common law defence of qualified privilege was extended. Previously it did not provide a defence against a defamation suit where a publication of government or political matters was made to a wide audience. It was now held that such circumstances could attract the privilege so long as the publisher exhibited ‘reasonableness of conduct’\textsuperscript{181} and was not actuated by common law malice.\textsuperscript{182}

\textit{B. No burden on the implied freedom}

The next example in which the inappropriateness of structured proportionality has been raised is not an implied freedom case but rather a case decided in the analogous context of implied voting rights. Both the implied freedom and implied voting rights derive their justification from the critical role they play in supporting the system of representative and responsible government established by the Constitution. Thus, there are many similarities in the methodological approaches taken in these areas.\textsuperscript{183} It is therefore instructive to look to the implied voting right cases for developments that might also be seen in the implied freedom context.

In \textit{Murphy v Electoral Commissioner},\textsuperscript{184} the plaintiffs sought a declaration that certain provisions of the \textit{Commonwealth Electoral Act 1918} (Cth) were invalid. The provisions at issue, inter alia, prevented the Electoral Commissioner from adding names to the Electoral Roll between 8.00pm on the day of the closing of the

\textsuperscript{180} Ibid 571.
\textsuperscript{181} Ibid 573.
\textsuperscript{182} Ibid 574.
\textsuperscript{183} See, for example, the observation that there is an ‘affinity’ between the second limb of the test set down in \textit{Lange v Australian Broadcasting Corporation} and the relevant test for determining whether there has been an impermissible legislative restriction of the franchise: \textit{Roach v Electoral Commissioner} (2007) 233 CLR 162, 199 [86] (Gummow, Kirby and Crennan JJ); \textit{Murphy v Electoral Commissioner} [2016] HCA 36, [63] (Kiefel J), [85] (Gageler J), [161] (Keane J), [293] (Gordon J).
\textsuperscript{184} [2016] HCA 36.
Electoral Roll and the close of the poll for the election. The plaintiff contended that the impugned provisions were invalid for effectively disqualifying individuals from exercising the choice mandated by ss 7 and 24 of the Constitution in the absence of a ‘substantial reason’. The provisions would only be for a substantial reason if they were ‘reasonably appropriate and adapted’ to an end consistent and compatible with the maintenance of the constitutionally prescribed system of representative government. The plaintiffs relied on structured proportionality in the presentation of their arguments. In particular, they emphasised the necessity stage of such analysis, contending that the electoral systems in New South Wales and Victoria providing for enrolments up to and on polling day amounted to obvious and compelling, reasonably practicable alternatives to the Commonwealth ‘suspension period’.

The Court unanimously dismissed the plaintiffs’ case at the end of the second day of hearings. In the reasons that followed, it was evident that Kiefel J had applied a structured proportionality approach to reach the conclusion that the laws were not an impermissible burden on the franchise. On the other hand, French CJ and Bell J, and Keane J, who had each joined in adopting structured proportionality in McCloy v New South Wales, declined to do so in Murphy v Electoral Commissioner. Their Honours had formed the view that structured proportionality was a ‘mode of analysis applicable to some cases…but not necessarily all’. Justice Gageler went much further, describing the plaintiffs’ attempt to ‘shoehorn’ their argument into structured proportionality as highlighting the ‘inappropriateness of attempting to apply such a form of proportionality testing here’.
Relevantly, French CJ and Bell J\(^{193}\) and Keane J\(^{194}\) did not regard the impugned provisions in *Murphy* an effective burden on the constitutional mandate. French CJ and Bell J noted that the relevance of structured proportionality would depend ‘upon the character of the law said to diminish the extent of the realisation of that mandate’.\(^{195}\) In the absence of a legislative burden, consideration of policy alternatives under the necessity stage of structured proportionality would, they said, amount to the Court undertaking a ‘hypothetical exercise of improved legislative design’.\(^{196}\) Similarly, Keane J rejected the appropriateness of what he described as ‘*Lange*-style analysis’ as recently applied in *McCloy* on the basis that the plaintiffs had failed to identify a burden.\(^{197}\) On the other hand, although Kiefel J did not expressly acknowledge the point, implicit in her Honour’s judgment was the conclusion that the impugned provisions did effect a burden on the franchise.\(^{198}\)

Justice Kiefel went on to apply structured proportionality analysis just as she had in *McCloy v New South Wales*.

Once again, the theoretical framework developed in this thesis can assist us to understand why structured proportionality was, rightly, considered inappropriate by some judges who had earlier considered it appropriate in a different context. For those who had reached the conclusion that the impugned provisions did not burden the franchise, there was in effect no conflict between competing rights or interests. As such, one of the characteristics of the balancing problem – that there be such a conflict between competing rights or interests – was not satisfied. Application of structured proportionality in such circumstances would not only have been inappropriate but also entirely unhelpful. There were no ‘principles’, to use Robert Alexy’s terminology as discussed in Chapter 3, to be balanced against each other.

\(^{193}\) Ibid [42] (French CJ and Bell J).
\(^{194}\) Ibid [181] (Keane J).
\(^{195}\) Ibid [38] (French CJ and Bell J).
\(^{196}\) Ibid [39] (French CJ and Bell J).
\(^{197}\) Ibid [202] (Keane J).
\(^{198}\) Her Honour noted that justification was necessary when there was ‘any detriment to, or burdening of, the ability to vote’ and then in the following paragraph of her judgment turned to the question of justification: *Murphy v Electoral Commissioner* [2016] HCA 36, [60]-[61]. That the impugned provisions constituted a determinant to or burdening of the ability to vote is therefore implicit in Kiefel J’s judgment.
On the other hand, Kiefel J’s position that there was a burden on the franchise meant that for her Honour all four of the characteristics of the balancing problem were satisfied:

1. There was a competition between two interests in conflict: the regulation of elections and the implied right to vote as evinced by the burden placed on the franchise.

2. The implied right to vote had constitutional status, being recognised as a necessary component of the system of representative and responsible government established by the Constitution. Similarly, the regulation of elections by Parliament was an exercise of constitutional power under s 51(xxxvi) and the relevant provisions of Chapter 1 of the Constitution.

3. The implied right to vote is not absolute, being recognised in a series of cases as being capable of being limited for a ‘substantial reason’.  

4. The implied right to vote cannot be defined in the abstract. While it has been suggested that the franchise can increase but not decrease, there is by no means a universal franchise in the sense that every Australian citizen (including citizens resident abroad, children, and those incarcerated for a period of more than three years) is eligible to vote. The implied right to vote is therefore something less than a universal franchise, but exactly what it is outside of a specific context appears to defy precise definition.

In light of the satisfaction of all the characteristics of the balancing problem, it was appropriate for Kiefel J to then proceed to an evaluative, contextual balancing exercise in the form of structured proportionality. For her Honour, there was a competition between two interests that conformed to the structure of ‘principles’, as described by Alexy. As discussed in Chapter 3, in a competition between two principles, structured proportionality offers an appropriate framework for resolving the balance between those principles in light of the contextual factual and normative constraints raised by the circumstances of the case.

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The above analysis supports the conclusion that it is possible to identify when structured proportionality is an appropriate analytical tool in a particular constitutional setting by considering whether the characteristics of the balancing problem have been satisfied. The capacity to differentiate between appropriate and inappropriate applications reduces the force of the claim made by some that structured proportionality is entirely inappropriate to the entire Australian constitutional context. It will be appropriate in some circumstances and not others, and it is possible to identify when and why.

VI. CONCLUSION

In the course of implying into the Constitution the freedom of political communication, the early cases in this area also explained and in some cases defined certain characteristics of that freedom. In particular, they explained why it was that the implied freedom would operate as a constitutional limit on otherwise legitimately exercised legislative powers; that the freedom was not, however, absolute in the sense that it would automatically trump competing statutory provisions; and, that the implied freedom could not be defined in the abstract. These features accord with the characteristics of the balancing problem as explained in Chapter 3. It is unsurprising, then, that a number of the judgments in these early cases acknowledged that deciding cases concerning the implied freedom would involve balancing competing interests.

There was, however, some resistance to the idea that implied freedom cases might require the Court to engage in a balancing exercise and therefore make value judgments. Judges who adhered to this approach insisted that legalistic tests which defined the implied freedom narrowly could be used to avoid balancing. Nonetheless, these approaches were not successful in marrying theory with the actual practice of deciding cases and it is evident that even these judges could not escape needing to engage in a balancing exercise in order to decide real cases.

In the more recent cases, three distinct approaches to deciding implied freedom cases have emerged. Under the first, the ‘reasonably appropriate and adapted’ formula established in Lange v Australian Broadcasting Corporation is seen as the touchstone for implied freedom cases. This approach disavows the need to engage
in value judgments in deciding implied freedom cases, but again the theory does not accord with the way that cases are decided under this approach. Under the second approach, the *Lange* formulation is also preferred, but in a form where the intensity of review is calibrated to the risk posed by an impugned law to the system of representative and responsible government. However, while the attempt to tie the review process to a substantive theory of judicial review is admirable, it suffers from the same underinclusiveness that has been the source of critique directed the restrictive institutional approaches discussed in Chapter 4.

The third approach that has emerged is the replacement of the second limb of *Lange* with structured proportionality and compatibility testing. Because this approach reflects the underlying balancing problem that sits at the heart of most implied freedom cases, it is an appropriate, and even desirable, approach to deciding implied freedom cases. Nonetheless, there are certain modifications that could be made to the analysis as it has been adopted in this area to enhance its conceptual clarity and legitimacy. The first of these is to explain the function that compatibility testing can be used to perform to aid the remainder of the analysis. The second is to tie the application of structured proportionality to a substantive theory of judicial restraint which responds flexibly to the circumstances of a particular case.

Subject to the modifications described above, structured proportionality is an appropriate analytical tool in most implied freedom cases and the criticisms that have been made of it are capable of being addressed. It has been asserted that structured proportionality is only a relevant analytical tool in contexts where there are constitutionally-entrenched rights. However, the theoretical framework developed in Part I of this thesis assists in explaining why this is not the case. It has also been suggested that structured proportionality is too constrictive of judicial discretion. A proper understanding of both the historical origins and conceptual underpinnings of proportionality analysis, as developed in Part I, serve to counter this proposition.

On the other hand, there are implied freedom cases in which the application of structured proportionality has legitimately been found to be inappropriate. The theoretical framework developed in Part I of this thesis assists in explaining that these circumstances arise when the characteristics of the balancing problem have
been displaced or do not arise on the facts of a case. As such, these situations are identifiable, and far from undermining the appropriateness of the method generally, their identification will serve to ensure that structured proportionality is applied only in contexts where it is appropriate and desirable to do so in a manner that is adapted to that context.
CONCLUSION

I. OVERVIEW

In recent times, proportionality has been the subject of intense scholarly and judicial interest around the world. It has been heralded as an example of a successful cross-jurisdictional transplant¹ and a ‘foundational element of global constitutionalism’.² Notwithstanding these claims, there remain fundamental unanswered questions regarding proportionality. The first is the unsettled question of what is meant by the very term ‘proportionality’. Does it refer to just one judicial method or is it a label encompassing many? A second, and related, question concerns the types of constitutional problems proportionality might be used to resolve. Is it suitable for use beyond rights adjudication and, if so, how and why? A third critical question arises from the issue of what institutional assumptions, if any, are embedded within proportionality. If these assumptions exist, do they have implications for proportionality’s transplant into new contexts?

As in many jurisdictions around the world, proportionality has been applied across a number of areas of constitutional law in Australia. However, its application in this jurisdiction has generated significant confusion and criticism. In line with the gaps in the global literature, much of the confusion has been centred around what proportionality is and what it assists courts to do. Proportionality has been said to mean different things in different contexts, but there has been very little explanation offered for why this is so. Nor has there been much work done to conceptually connect the supposedly different meanings of proportionality to the specific

² Grant Huscroft, Bradley W. Miller and Gregoire Webber, ‘Introduction’ in Grant Huscroft, Bradley W. Miller and Gregoire Webber (eds), Proportionality and the Rule of Law (Cambridge University Press, 2014) 1.
contexts in which they are said to be of utility. No doubt fuelled by this confusion, criticisms of proportionality have largely revolved around a general perception that it is an inappropriate judicial method in Australian constitutional reasoning. To the extent that attempts have been made to articulate this reservation in more specific terms, it has been said that proportionality is not appropriate in Australia because, unlike other jurisdictions in which it is applied, this jurisdiction does not have a bill of rights. Proportionality thus leads judges to exceed their constitutional function by encouraging them to engage in value-laden decision-making within a non-rights context. It has also been suggested that proportionality is rigid and formulaic and that these characteristics unjustifiably hinder the judicial reasoning process.

Against this background, this thesis has sought to address a fundamental question: when can proportionality be used as an appropriate method of judicial reasoning in Australian constitutional law? In seeking an answer to this question, the thesis examined the literature and jurisprudence on proportionality in two distinct Parts.

In Part I, the thesis developed a theoretical framework through which to understand the conceptual and analytical role of proportionality in constitutional adjudication. It noted that proportionality has a philosophical lineage that pre-dates its arrival in public law, but that once it emerged in this field it took on two distinct forms: a balancing form of analysis which eventually became structured proportionality and means ends analysis. It argued that structured proportionality is an appropriate analytical tool when a ‘balancing problem’ arises, and that it is capable of being applied at variable intensities of review in response to contextual and institutional considerations. Part I concluded that not only is structured proportionality an appropriate analytical tool for dealing with ‘balancing problems’ but that, if combined with a robust and articulated theory of judicial restraint, it is also the most preferable approach when compared to known alternatives.

In Part II of the thesis, the theoretical framework developed in Part I was applied to three areas of Australian constitutional jurisprudence to develop a deeper

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3 See Chapter 2, Section II.
4 See Chapter 2, Section III.
5 See Chapter 3, Section V.
6 See Chapter 4, Section III.
7 See Chapter 5, Section VI.
understanding of the role of proportionality in those contexts. It was observed that in relation to the characterisation of laws and the freedom of interstate trade and commerce, the ‘balancing problem’ does not arise and thus structured proportionality has no analytically appropriate role to play. Instead, in those contexts, a test similar to ‘necessity’ analysis can be used for the purpose of ‘smoking out’ illegitimate legislative purposes. By contrast, in most cases concerning the implied freedom of political communication, there is an identifiable ‘balancing problem’. Part II concluded that, when coupled with a robust and articulated theory of judicial restraint, structured proportionality is an appropriate analytical tool in these circumstances.

In the course of addressing the research question at the heart of this thesis, it was observed that the label ‘proportionality’ has been applied to a range of conceptually discrete forms of analysis in Australian constitutional law. These forms of analysis are suitable in distinct and identifiable sets of circumstances, and an understanding of these circumstances assists in dealing with some of the central concerns in this field. The fundamental question of when proportionality is an appropriate analytical tool in Australian constitutional law must, therefore, be considered with respect to each form of analysis separately, as summarised below.

II. KEY FINDINGS

A. Structured proportionality

The primary focus of this thesis has been the form of analysis known as ‘structured proportionality’. As discussed in Chapter 2, structured proportionality emerged in post-war German constitutional law and eventually spread to jurisdictions around the world. It generally proceeds in three consecutive stages of analysis: suitability (sometimes including a legitimate aim test); necessity and strict proportionality.

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8 See Chapter 6, Section IV and Chapter 7, Section IV.
9 See Chapter 6, Section IV and Chapter 7, Section III and IV.
10 See Chapter 8, Section III.
11 See Chapter 2, Sections III and IV.
12 See Chapter 1, Section I; Chapter 3, Section V.
Chapter 3 argued that structured proportionality is an appropriate analytical tool for resolving ‘balancing problems’ when they arise in constitutional adjudication.\textsuperscript{13} Moreover, it argued that a ‘balancing problem’ is identifiable by the presence of four characteristics in a constitutional challenge to legislative action: (1) that there are two sets of rights or interests in conflict; (2) both sets have the same \textit{prima facie} normative status – that is, they are both sourced in the constitution; (3) neither operates absolutely; and (4) at least one cannot be defined in the abstract.\textsuperscript{14} Where these four characteristics are satisfied, there is a conflict between ‘principles’, and structured proportionality offers a theoretically grounded method for addressing that problem in a way that takes into account factual and normative considerations.

Chapter 3 contended that the necessity and strict proportionality stages of structured proportionality are particularly important in resolving a ‘balancing problem’. The necessity test is focused on finding a position of \textit{factual} optimisation between the competing interests. It does this by asking whether, given the empirical constraints on the exercise – such as the identification of an alternative which is \textit{just as effective} at achieving the same end as the impugned law – is the identified alternative less restrictive of a competing interest? If the answer is yes, then it is possible to say that the impugned law has exceeded the point of factual optimisation and is therefore not capable of being justified as a valid law.\textsuperscript{15} Similarly, the strict proportionality test aids in finding a position of \textit{normative} optimisation. That is, it asks, given the value that we would place on the competing interests, does the fulfilment of one exceed the degree of non-fulfilment (incursion) into the other? Ultimately, this is undertaken as a heuristic rather than a mathematical exercise, which is why it is acknowledged that the last stage requires a \textit{value judgment}. Nonetheless, as Chapter 3 concluded, it is a value judgment for which the provision of reasons as to the value placed on each competing interest, and the assessment of the nature or degree of incursion into the burdened interest, are essential.\textsuperscript{16}

Chapter 4 argued that structured proportionality emerged as a compromise between two competing forces in post-war German constitutionalism: the German legal

\textsuperscript{13} See Chapter 3, Section V.
\textsuperscript{14} Ibid. For applications, see Chapter 6, Section IV; Chapter 7, Section IV; Chapter 8, Section III.
\textsuperscript{15} Ibid.
\textsuperscript{16} See Chapter 3, Sections V and VI.
scientific tradition, on one hand, and transformative constitutionalism, on the other. The chapter contended that the structure of this form of analysis is, as a consequence, neutral towards the relative institutional roles of the judiciary and the legislature within a constitutional system. Its neutrality means that structured proportionality is capable of being applied with greater or lesser intensity. This makes the method flexible and contextually responsive. It also means, however, that unless it is connected with a robust and articulated theory of judicial restraint, its application risks masking significant higher order judgments regarding the institutional roles of the judiciary and the legislature. In light of this risk, this thesis has argued that the application of structured proportionality should be conditioned by a clearly articulated contextual institutional theory of judicial restraint.

Unlike their restrictive institutional counterparts, contextual institutional theories do not focus on a single factor, such as systemic failures in the democratic process, as decisive of appropriate levels of judicial restraint. Instead, they acknowledge that in any given case there is likely to be a range of factors that will influence such an assessment. These are likely to coalesce around two key themes: factual uncertainty and normative uncertainty. Factual uncertainty may arise where, in the circumstances, the judiciary is hampered by its limited institutional competency from making the factual findings necessary to decide a ‘balancing problem’ with relative certainty. In such cases, it may be that the legislature has, for institutional reasons, greater empirical capacity to make those necessary findings of fact. Where there is greater factual uncertainty, it may be appropriate for a court to adopt a more restrained approach in its conduct of judicial review to reflect the legislature’s greater competency in the circumstances. As argued in Chapter 4, the necessity stage of structured proportionality – which is concerned with factual considerations – may be applied with less intensity to accommodate the level of review required in such circumstances.

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17 See Chapter 4, Section II.
18 See Chapter 4, Section III.
19 Ibid.
20 Ibid.
21 Ibid.
Similarly, greater normative uncertainty may arise when the courts are unable to reach a conclusion on value judgments relevant to deciding a ‘balancing problem’ with relative certainty. In such circumstances, it may be that the legislature has, again for institutional reasons, greater democratic legitimacy in making such a value judgment. When it is faced with greater normative uncertainty, it may be appropriate for the court to adopt a more restrained approach to reflect the legislature’s greater democratic legitimacy in the circumstances. Thus, Chapter 4 argued that the strict proportionality stage of analysis – which is concerned with normative considerations – may be applied with less intensity to accommodate the level of review justified in the circumstances.

Chapter 4 argued that conditioning the application of structured proportionality in this way enables it to respond to institutional considerations that arise on a case-by-case basis. It reduces the force of the charge that structured proportionality encourages courts to exceed their constitutional supervisory role. Moreover, it enhances the transparency of structured proportionality by enabling the underlying factual and normative assessments being made to be clearly distinguished from the institutional considerations affecting judicial review. Lessening the intensity of review does not pre-determine the outcome of a case; it merely acknowledges that there may be higher order institutional considerations that must be recognised and accounted for. It therefore does not involve an abdication of judicial responsibility. In all of these ways, the general criticism that structured proportionality is an ‘inappropriate’ analytical tool in the Australian constitutional context can be countered.22

In Chapter 5, it was contended that structured proportionality is not just an appropriate method of judicial reasoning in the context of a ‘balancing problem’, but that it is also the most preferable when contrasted with alternative methods that have developed in the United States. It was concluded that, when compared to formalism and tiered scrutiny based on categorisation, structured proportionality is more contextually responsive to the nature of a ‘balancing problem’. The two American alternatives, on the other hand, rely on rigid rules or categories such that

22 See Chapter 4, Section III and Chapter 8, Section IV.
the necessary balancing takes place *a priori*. Ultimately, this makes each vulnerable to considerable under or overinclusiveness in its operation. A third method, ad hoc balancing, was also argued to be less preferable than structured proportionality for reasons that will be discussed below.

Structured proportionality was identified as an appropriate analytical tool in only one of the domestic contexts considered in this study: in relation to (most) implied freedom of political communication cases. As argued in Chapter 8, the majority of these cases display the four characteristics of a ‘balancing problem’ and are therefore appropriate candidates for the application of structured proportionality. The theoretical framework developed in this thesis thus supports the majority approach taken in *McCloy v New South Wales* and *Brown v Tasmania*, albeit with minor modifications.

On the basis of these findings, the thesis concludes that structured proportionality, when coupled with a robust contextual theory of judicial restraint, is an appropriate analytical tool in areas of Australian constitutional law where a ‘balancing problem’ arises, such as most cases concerning the implied freedom of political communication. On the other hand, structured proportionality is not an appropriate analytical tool in cases where a ‘balancing problem’ does not arise, such as where there has been found to be no burden on the implied freedom.

### B. Means ends analysis

As discovered from the historical analysis undertaken in Chapter 2, a distinct (but related) form of proportionality analysis emerged in 19th century Prussian administrative law. It was a judicial response to an administrative state that was growing in size and increasingly encroaching on the freedoms enjoyed by individuals. Legal theorists had originally suggested that where a conflict arose between two sets of interests, such as an emboldened police power to hold on

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23 See Chapter 8, Section IV.
25 [2017] HCA 43.
26 See Chapter 8, Sections IV and V.
27 See Chapter 8, Section V.
28 See Chapter 2, Section III.
remand and an individual’s liberty, this could be resolved through a process of justification. That process of justification would proceed in two parts. The first part would test the appropriateness of the administrative means used to achieve a particular end. If the means were broader than necessary to achieve their ends, then the administrative measure would be impermissible. If they were not overbroad, then a second question would be asked: do the ends justify the incursion that is made into the competing interest? If the answer was no, then the administrative measure would be deemed impermissible. Answering this second question involved a qualitative assessment of the value of the ‘end’ being sought to be achieved, and thus required what we would now call a value judgment.

These tests were very similar to the last two, and most evaluative, parts of structured proportionality and were indeed its intellectual precursors. However, the Prussian administrative courts did not strictly have constitutional authority – and therefore legitimacy – to carry out this kind of intense review of administrative action. As Chapter 2 observed, rather than undertaking a full analysis that would lead them to making value judgments and therefore potentially raise accusations of illegitimate, quasi-constitutional power-grabbing, the Prussian administrative courts largely limited their reasoning to the first stage of the full theory described above, or what has been described as ‘means ends analysis’ in this thesis. By asking only that there be some connection between the means adopted and ends sought to be achieved, the courts were restraining themselves to a more legalistic style of analysis, which was much safer ground for an institution feeling its way to constitutional legitimacy. On the other hand, however, the analysis was only ever a proxy form of what the courts were actually trying to achieve, which was to balance two competing interests against each other. As argued in Chapter 2, it only ever approximated the ‘correct’ outcome to that balancing exercise, which in many cases would have meant that an unjust outcome was reached or, in an attempt to avoid unjust outcomes, that the courts would go ahead and conduct a more qualitative balancing without the label.
Chapter 8 argued that the same pattern has appeared in some areas of Australian constitutional law. Unlike its Prussian administrative counterparts, there is little doubt that the High Court has constitutional authority to conduct judicial review of legislative action. Nonetheless, there have been attempts to address certain ‘balancing problems’ on the basis of ‘means ends analysis’ in order to avoid engaging in value judgments. Given the inadequacies of this proxy form of analysis, however, we find that even those judges who have attempted to adhere to a means ends analysis in the face of a balancing problem have ended up making value judgments implicitly. On this basis, Chapter 8 argued that ‘means ends analysis’ is not an appropriate method for responding to the institutional considerations raised by ‘balancing problems’, including the need for judicial restraint.

The disjuncture between espoused approaches to deciding cases and the actual practice of deciding them has led to a general confusion regarding the appropriate role for and application of proportionality analysis. This thesis has contended that, where a balancing problem arises, a contextual and evaluative form of analysis, such as structured proportionality, is needed to address the problem. Of course, if a law does not pass the ‘necessity’ stage, then there will be no need to conduct a value judgment at the last ‘strict proportionality’ stage of structured proportionality analysis. However, if a law does pass the necessity stage, then the analysis ought to proceed towards the strict proportionality stage in order to properly and openly address the conceptual question that lies at the heart of a constitutional challenge raising a ‘balancing problem’.

The thesis thus concludes that means ends analysis, on its own, is not an appropriate analytical tool in Australian constitutional law where a ‘balancing problem’ arises.

C. Ad hoc balancing

Another method with which ‘proportionality’ has sometimes been associated is ad hoc balancing. This form of analysis is a contextual, evaluative way of assessing the competition between interests that arises in the course of a ‘balancing

29 See Chapter 8, Section II and III.
30 See Chapter 1, fn 1.
31 Ibid.
problem’. It is therefore an analytically appropriate way of reasoning through such a problem, unlike the proxy form of means ends analysis. However, as argued in Chapter 5, this approach has significant deficiencies when compared to the alternative of structured proportionality, making it a less desirable way of undertaking judicial reasoning when a ‘balancing problem’ arises. Critically, ad hoc balancing does not guide judges to structure their analysis in any particular way. It merely suggests that the two interests in conflict in a balancing problem should be ‘weighed’ against each other. For this reason, when ad hoc balancing is undertaken, a number of problems have the potential to arise.

As Chapter 5 contended, the first potential problem is that a value judgment might be made even when the case could have been decided on more legalistic grounds, such as by reaching the conclusion that a less restrictive alternative was available. Proceeding straight to a value judgment invariably raises concerns regarding judges exceeding their supervisory role. The second conceivable pitfall is that the reasoning in ad hoc balancing may not be as transparent as in structured proportionality. It is more challenging for external actors to scrutinise judgments reasoned on an ad hoc basis simply because this approach does not follow a predictable structure. It is particularly difficult to discern whether a judge has avoided a particular line of reasoning because it is inappropriate for the case at hand (a legitimate approach) or because it simply does not support the outcome that judge wishes to reach (an illegitimate approach). The third potential difficulty is that ad hoc balancing cannot be modified in predictable ways to accommodate variable levels of judicial restraint. Thus, as Chapter 5 concluded, even if a judge tells us they are applying a certain level of restraint, there is no way to check.

This thesis has argued that ad hoc balancing has appeared in at least two places in Australian constitutional law. As discussed in Chapter 6, the first is in the context of the characterisation of laws, where some judges have sought to use employ the notion of ‘proportionality’ (in an ad hoc balancing sense) to apply limits to the exercise of legislative powers by balancing them against other extra-constitutional

32 See Chapter 5, Section IV.
33 Ibid.
interests. However, as was discussed in that chapter, this is not a ‘balancing problem’. As Chapter 6 concluded, the use of ad hoc balancing in this context is therefore analytically inappropriate and raises considerable concerns regarding the constitutionalisation of extra-constitutional interests.

Chapter 8 identified a second place in which ad hoc balancing has appeared: the early cases on the implied freedom of political communication. Some of the judgments in these cases acknowledged that a balancing of interests was required to decide these cases. While these approaches were not analytically inappropriate, given that a ‘balancing problem’ does indeed arise in this context, in light of the discussion above, ad hoc balancing in this context is not as desirable as structured proportionality.

The thesis thus concludes that, while ad hoc balancing is not an analytically inappropriate method when a ‘balancing problem’ arises in Australian constitutional law, it is less preferable than structured proportionality.

D. ‘Smoking out’ a law’s purpose

Another area where considerable confusion has arisen is in the association of ‘proportionality’ with what is more accurately described as an analysis focused on ‘smoking out’ unconstitutional purposes. The confusion has arisen because ‘smoking out’ analysis shares analytical similarities with the necessity stage of structured proportionality analysis. That is, in the course of undertaking both forms of analysis, a court is concerned with asking whether there are alternative means available for achieving the same ends as the impugned law with less restrictive effect on another interest.

There are nonetheless significant differences between these forms of analysis. First, the answers they produce are important for different analytical reasons. In the case of the ‘necessity’ test, the presence of a less restrictive alternative suggests that a law has encroached upon a competing constitutional interest too much to be justified. That is, it is unconstitutional because another law could have been enacted.

34 See Chapter 6, Section IV.
35 See Chapter 6, Section V.
36 See Chapter 8, Section II.
to achieve the same end without impacting on a competing interest as much. The analysis therefore requires an identification of the competing interest with some level of precision, even if it cannot be defined in the abstract. Furthermore, upon reaching the conclusion that there is a less restrictive alternative available, the result for the law’s validity is foreclosed: it is invalid. This kind of analysis is only relevant on the context of a ‘balancing problem’.

On the other hand, upon the application of the ‘smoking out’ test, if there is a ‘narrower’ way of achieving the same end as the law in question, then this suggests that perhaps the end that the law has been held out as being aimed at is not its real purpose. In other words, there may by some other purpose – perhaps even an unconstitutional purpose – that, upon proper construction, is its real end. This kind of ‘smoking out’ analysis may be helpful in contexts where a law’s validity turns on establishing a sufficient connection between its purpose and a constitutional purpose, or on establishing whether the law is pursuing a constitutionally impermissible purpose. Most relevantly, as argued in Chapters 6 and 7, ‘smoking out’ analysis is not related to balancing interests under a ‘balancing problem’. Rather it is an aid to establishing the real purpose of a law.

This thesis has argued that ‘smoking out’ analysis has been used in at least two contexts in Australian constitutional law. The first is in the characterisation of laws enacted with the support of the so-called ‘purposive powers’, as discussed in Chapter 6. Here, ‘smoking out’ analysis has been used to establish whether a law which has been allegedly enacted with the support of a constitutional head of power is actually aimed at some other purpose not connected with that head of power. The second application, as discussed in Chapter 7, is in the context of s 92. Here, ‘smoking out’ analysis has been used to assess whether a law is potentially pursuing a protectionist purpose under the guise of some other purpose. The pursuit of a protectionist purpose is unconstitutional under the s 92 guarantee, and therefore renders the law invalid. For the reasons given in Chapters 6 and 7, neither of these areas conforms to the characteristics of the ‘balancing problem’.

37 See Chapter 6, Section IV.
38 See Chapter 7, Section III.
Although it has been suggested in the jurisprudence that ‘smoking out’ forms of analysis are synonymous with ‘proportionality’, this thesis contends that, in light of the critical differences between them, the nomenclature of proportionality should be abandoned where the court is concerned with uncovering the true purpose of a law to test its validity. Despite some analytical similarity between proportionality and ‘smoking out’ analysis, making the distinction between them clear will alleviate some of the confusion in this area and also ensure that evaluative, contextual proportionality analysis involving balancing competing interests is not inadvertently brought into contexts where this kind of approach would be inappropriate.

The thesis concludes that ‘smoking out’ analysis is not an appropriate analytical tool where a ‘balancing problem’ arises in Australian constitutional law, but that it may be helpful in circumstances where the constitutionality of a law’s purpose is directly relevant to the question of the law’s validity.

E. Reasonably appropriate and adapted

It has become a common refrain in Australian constitutional jurisprudence to suggest that ‘proportionality’ and the formula ‘reasonably appropriate and adapted’ are interchangeable. Although the ‘reasonably appropriate and adapted’ formula has a long history of usage in Australia, even predating the terminology of ‘proportionality’, its association with the latter concept has reduced any precision of meaning which once might have been ascribable to it. It could now mean any form of analysis extending from structured proportionality, means analysis, or ad hoc balancing through to ‘smoking out’ unconstitutional purposes. Conversely, it does not appear to ever have been used in a manner distinct from these usages such that there might be reason to retain it as a discrete concept.

The thesis concludes that, in order to avoid further confusion in this area, the use of the phrase ‘reasonably appropriate and adapted’ ought to be discarded in the areas of Australian constitutional law considered in this study in favour of terminology that identifies the precise form of analysis employed.

39 See Chapter 6, Section III.
III. FURTHER RESEARCH

The key findings outlined above are a product of the particular study conducted in producing this doctoral thesis and are, as a consequence, necessarily limited in their scope. This field would greatly benefit from supplementary research to further enhance our understanding of structured proportionality and refine its application. In the following section, some avenues for such research are briefly noted.

The first area is a study of aspects of Australian constitutional jurisprudence not directly considered by this thesis, such as cases concerning Chapter III and the Melbourne Corporation principle. Such a study could suggest areas in which structured proportionality has not yet been applied but where the jurisprudence might usefully develop to incorporate it as an aid to judicial reasoning. On the other hand, it may demonstrate that, on a proper consideration of its function and appropriateness, structured proportionality should not be applied in certain areas. An application of the theoretical framework proposed in this thesis, particularly in relation to the identification of a ‘balancing problem’, may be useful in this regard.

Second, although this thesis has suggested that factual and normative uncertainty in judicial decision-making may be accommodated by varying the intensity of review undertaken in the application of structured proportionality, further work may be conducted to reduce that uncertainty itself. For example, the evidentiary processes of courts might be reviewed for their adequacy in assisting judges to deal with the factual complexities that can arise in cases involving ‘balancing problems’. Similarly, further work relating to the values underpinning a constitutional system may assist in reducing the normative uncertainty.

Finally, this study has relied on certain justifications for proportionality in reaching the conclusion that it is not just an appropriate, but also a desirable analytical tool in response to a ‘balancing problem’. These include claims of enhanced

40 See references in Chapter 1, Section IV.D.
41 In line with Kenneth Hayne’s suggestion that ‘If the tools and techniques available to the courts are inadequate, that is what should be pointed out’: Kenneth Hayne, ‘Deference – An Australian Perspective’ (2011) Public Law 75, 88.
42 Important work of this kind has already begun in Australia. See, for example, Rosalind Dixon (ed), Australian Constitutional Values (Hart Publishing, 2018); Elisa Arcioni and Adrienne Stone, ‘The small brown bird: Values and aspirations in the Australian Constitution’ (2016) 14 International Journal of Constitutional Law 60.
transparency in judicial reasoning, and facilitation of inter-institutional dialogue. These claims should be subjected to further scrutiny through longitudinal empirical studies which look at the real-world impact that structured proportionality has within a constitutional system.\textsuperscript{43}

IV. CONCLUSION

This thesis addressed the key question of when proportionality is an appropriate analytical tool in Australian constitutional law. With an understanding of the conceptually distinct forms of analysis which have all, until now, been bundled under the label of ‘proportionality’, it is hoped that some of the confusion and reservations in this area might be considered in a new light. The framework developed in this thesis for identifying a ‘balancing problem’ may assist in extending the application of structured proportionality to new contexts. Conversely, the framework may be of benefit in identifying circumstances in which structured proportionality is not an appropriate analytical method, but where other tools such as ‘smoking out’ analysis may be of assistance. The application of structured proportionality is likely to be enhanced by being coupled with a contextual theory of judicial restraint, enabling it to be applied at variable intensities that are responsive to contextual and institutional considerations. In these ways, over time, proportionality may come to be seen as an appropriate, and perhaps even desirable, analytical tool in some areas of Australian constitutional law.

\textsuperscript{43} Some empirical work of this nature has been undertaken. See, for example, Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (Cambridge University Press, 2017). However, more is needed as well as a focus on Australia.
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