

Review Essay

Understanding Proportionality Analysis

Proportionality in Australian Constitutional Law
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Abstract

The use of proportionality reasoning to determine whether there has been an actionable breach of constitutional rights is spreading around the globe. Except in assessing the constitutional validity of legislation claimed to infringe the implied freedom of political communication, it has not taken root in Australia. If, as claimed in its favour, proportionality reasoning can promote transparency and accountability, should it be more widely adopted in this country; or is it in all respects an exotic jurisprudential pest? By explaining the concept, its legal history, and the staged reasoning of structured proportionality, *Proportionality in Australian Constitutional Law* by Shipra Chordia provides context and clarity for those engaged in the debate. Dr Chordia supports the role of proportionality reasoning in cases dealing with the implied freedom, but recognises and confronts the objections that have been raised. Her book raises important issues for the ongoing development of Australian constitutional law.

I Introduction

In 2015, Vicki C Jackson of Harvard wrote a paper entitled ‘Constitutional Law in an Age of Proportionality’.¹ She addressed ways in which a tool for jurisprudential analysis which was being adopted in legal systems across the western world might inform constitutional analysis in the United States (‘US’). On 7 October 2015, the High Court of Australia delivered judgment in *McCloy v New South Wales*,² a case involving the implied freedom of political communication, in which a majority of the Court (French CJ, Kiefel, Bell and Keane JJ) expressly adopted a form of proportionality analysis³ to determine the validity of the impugned statute. The new

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¹ Vicki C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124(8) *Yale Law Journal* 3094. Professor Jackson is Laurence H Tribe Professor of Constitutional Law at Harvard Law School.

² *McCloy v New South Wales* (2015) 257 CLR 178 (‘*McCloy*’).

³ *Ibid* 195–6 [3]–[4].

book by Shipra Chordia, *Proportionality in Australian Constitutional Law*,⁴ is undoubtedly timely. Further, as Sir Anthony Mason says of the book in the Foreword, '[i]t is the product of wide-ranging research and scholarship, aided by a clear understanding and explanation of the complex issues which arise.'⁵

As Chordia recognises,⁶ the adoption of 'structured proportionality' in *McCloy* involved a departure from the principles by which the High Court reviewed legislation that might infringe the implied freedom of political communication in *Lange v Australian Broadcasting Corporation*.⁷ Only two years before *McCloy*, in *Unions NSW v New South Wales*,⁸ the Court had applied the approach adopted in *Lange*, as had other cases over the intervening years. That *McCloy* involved a change in course by four members of the Court, suggested a degree of doctrinal instability. Although the plurality noted that *Lange* 'pointed clearly in the direction of proportionality analysis',⁹ their Honours did not suggest that the adoption of structured proportionality was driven by precedent. The sense of instability was not diminished by the express rejection of proportionality reasoning by Gageler J,¹⁰ its non-adoption by Nettle J,¹¹ and the rejection of 'uncritical use of proportionality from other legal contexts' by Gordon J.¹²

Cognisant of the division of views in the High Court, both in *McCloy* and in later cases, Chordia sets out to demonstrate the source of proportionality analysis, its nature and history, and the benefits it may provide by way of transparency and predictability, at least when determining whether legislation infringes the implied freedom of political communication. Chordia's analysis is careful, methodical, and well-expressed, essential qualities in addressing the fundamental tensions that have given rise to strongly disparate judicial views on this topic and a growing library of academic commentary.

II Proportionality Analysis Explained

Chordia identifies the criteria for invoking proportionality analysis as follows:

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

⁴ Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020). Dr Shipra Chordia is, as the book notes, in practice at the NSW Bar, and has a PhD in Constitutional Law from the University of New South Wales. The manuscript was awarded the 2019 Holt Prize.

⁵ Sir Anthony Mason, 'Foreword' in Chordia (n 4) v.

⁶ Chordia (n 4) 159–62.

⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

⁸ *Unions NSW v New South Wales* (2013) 252 CLR 530.

⁹ *McCloy* (n 2) 214 [70] (French CJ, Kiefel, Bell and Keane JJ).

¹⁰ *Ibid* 234 [140]ff.

¹¹ *Ibid* 259 [222].

¹² *Ibid* 288 [339]. See generally 287–9 [336]–[339].

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.
4. The implied freedom – contingent as it is on the more amorphous concept of representative and responsible government – cannot be defined in the abstract.¹³

The cumulative effect of these four criteria is to require a balancing exercise in order to determine the validity of the statutory provision.

The doctrinal tool for balancing the conflicting interests, known as ‘structured proportionality’, is summarised by Chordia as involving three questions, to be addressed in order:

- (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.¹⁴

The antecedent or threshold question identified in (i) should not be glossed over. In Australia, it will involve a determination that the law in question falls within a relevant head of legislative power under, usually, s 51 of the *Australian Constitution*. Answering that question may involve two separate steps, namely: determining the scope of the constitutional head of power, an exercise known as ‘characterisation’;¹⁵ and construing the statutory provision under review. Because we seek to construe legislation to uphold validity, questions of constitutionality can be intertwined with questions of statutory construction; how structured proportionality analysis fits within that framework is itself an important issue.

The preliminary question aside, each of the three structured proportionality questions, taken in order, requires the court either to make an evaluative judgment, or to supervise legislative judgments made by the Parliament. As Chordia correctly observes,¹⁶ Australian judges express degrees of discomfort with the former exercise. For example, the second step in the proportionality analysis accepted in *McCloy* asks whether the purpose of the impugned legislation could have been

¹³ Chordia (n 4) 171.

¹⁴ *Ibid* 3 (emphasis in original).

¹⁵ See, eg, James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015) chs 2–3.

¹⁶ Chordia (n 4) 8–9.

pursued by reasonably practicable alternative means having a less restrictive effect on the protected freedom. The scope of that inquiry was limited in *McCloy* by accepting that ‘necessity’ would be satisfied if there were ‘no obvious and compelling’ alternative involving less restrictive means available.¹⁷

III Objections to Proportionality Analysis

Chordia devotes Chapter 4 to a consideration of the charge that proportionality analysis ‘invites the judiciary to exceed its institutional role, both in terms of its legitimacy and its competency’.¹⁸ Her analysis of the interrelationship between principles of judicial restraint and structured proportionality is both powerful and nuanced. However, she is not sympathetic to what she describes as ‘restrictive institutional approaches’,¹⁹ stating:

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.²⁰

It is by no means clear that this conclusion is the only one consistent with acceptance of proportionality analysis. Arguably, it gives support to criticisms of proportionality reasoning raised by Gageler J in *McCloy* and discussed below.²¹ This passage also raises a fundamental issue as to the role of the courts in the constitutional structure of the Australian Federation: this too will be addressed below.

A related objection to the introduction of proportionality analysis into Australian constitutional review of legislation was articulated by Gleeson CJ in 2007 in a voting rights case, *Roach v Electoral Commissioner*.²² *Roach* involved a successful challenge to a Commonwealth law disenfranchising any person who is ‘serving a sentence of imprisonment’ from voting.²³ Laws preventing voting by prisoners had been challenged in Canada in *Sauvé v Canada (Chief Electoral Officer)*,²⁴ and in the United Kingdom in the European Court of Human Rights, in *Hirst v United Kingdom (No 2)*.²⁵ The *Canadian Charter of Rights and Freedoms* relied on in *Sauvé* conferred a right to vote, but contained an express limitation by reference to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.²⁶ The *European Convention on Human Rights* adopts a similar

¹⁷ *McCloy* (n 2) 195 [2], 211 [58], 217 [81]–[82] (French CJ, Kiefel, Bell and Keane JJ).

¹⁸ Chordia (n 4) 63.

¹⁹ *Ibid* 75–7.

²⁰ *Ibid* 77.

²¹ See below nn 59–63 and accompanying text.

²² *Roach v Electoral Commissioner* (2007) 233 CLR 162 (Gleeson CJ writing separately; Gummow, Kirby and Crennan JJ writing together; Hayne and Heydon JJ dissenting) (*‘Roach’*).

²³ *Ibid* 185 [38].

²⁴ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 (*‘Sauvé’*).

²⁵ *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 41 (*‘Hirst’*).

²⁶ *Canada Act 1982* (UK) c 11, sch B pt I s 1 (*‘Canadian Charter of Rights and Freedoms’*).

structure, conferring rights, subject to justifiable limitations.²⁷ Speaking of the Canadian Charter, Gleeson CJ in *Roach* stated:

This qualification requires both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right. It is this minimum impairment aspect of proportionality that necessitates close attention to the constitutional context in which that term is used.²⁸

With respect to the decision of the European Court of Human Rights in *Hirst*, Gleeson CJ noted:

The majority accepted that the United Kingdom law pursued the legitimate aim of enhancing civic responsibility and respect for the rule of law by depriving those who had breached the basic rules of society of the right to have a say in the way such rules were made for the duration of their sentence. However, they concluded that the measure was arbitrary in applying to all prisoners, and lacked proportionality (which in this context also required not only a rational connection between means and ends but also the use of means that were no more than necessary to accomplish the objective), even allowing for the margin of appreciation to be extended to the legislature.²⁹

The Chief Justice continued:

There is a danger that uncritical translation of the concept of proportionality from the legal context of cases such as *Sauvé* or *Hirst* to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action. Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our *Constitution*. They create a relationship between legislative and judicial power significantly different from that reflected in the *Australian Constitution* ...³⁰

A further case involving voting rights arose shortly after the decision in *McCloy*. In 2016, in *Murphy v Electoral Commissioner*,³¹ the Court considered a challenge to statutory provisions requiring the closure of the electoral roll on the seventh day after the issue of a writ for an election. It was contended that the early closure disenfranchised persons who might otherwise have obtained enrolment prior to polling day. The plaintiffs expressly relied upon the form of proportionality reasoning adopted by the joint judgment in *McCloy*.³² The law was said to exclude a class of adult citizens from participating in a federal election in circumstances

²⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 5 (entered into force 3 September 1953) art 18.

²⁸ *Roach* (n 22) 177–8 [15] citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197–9 [33]–[38]; *Sauvé* (n 24) 534–5 [7].

²⁹ *Roach* (n 22) 178 [16] citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.

³⁰ *Roach* (n 22) 178–9 [17].

³¹ *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ('*Murphy*').

³² See *ibid* 33 (C J Tran) (during argument).

where, as state laws to similar effect demonstrated, enrolment up to and including polling day was a practical alternative that had no such limiting effect on participation in the choice of representatives at the election.³³ The challenge was unanimously rejected.

French CJ and Bell J accepted the potential availability of proportionality reasoning, noting that its adoption in *McCloy* ‘did not reflect the birth of some exotic jurisprudential pest destructive of the delicate ecology of Australian public law’.³⁴ However, their Honours held such an approach not to be appropriate in dealing with what were said to be obvious and compelling legislative alternatives:

These arguments invited the Court to undertake a hypothetical exercise of improved legislative design by showing how such alternatives could work. In so doing, they invited the Court to depart from the borderlands of the judicial power and enter into the realm of the legislature. The *McCloy* analysis was inapposite in this case.³⁵

Referring to the alternative schemes used in state electoral systems, French CJ and Bell J stated:

The existence of such possibilities does not support a characterisation of the design limits of the existing Act as a ‘burden’ upon the realisation of the constitutional mandate of popular choice. The impugned provisions do not become invalid because it is possible to identify alternative measures that may extend opportunities for enrolment. That would allow a court to pull the constitutional rug from under a valid legislative scheme upon the court’s judgment of the feasibility of alternative arrangements.³⁶

By contrast, Kiefel J held:

The aim of any testing for proportionality is to ascertain the rationality and reasonableness of a legislative restriction in a circumstance where it is recognised that there are limits to legislative power. Proportionality analysis does not involve determining policy or fiscal choices, which are the province of the Parliament. Thus the test of whether there are alternative, less restrictive means available for achieving a statutory object, which assumes some importance in this case, requires that the alternative measure be otherwise identical in its effects to the legislative measures which have been chosen. It will not be equal in every respect if it requires not insignificant government funding.³⁷

Keane J found that there was no burden on the constitutional mandate that representatives should be ‘chosen by the people’; ‘rather, their case was no more than a complaint that better arrangements might be made to fulfil the mandate’.³⁸

³³ Ibid. See also at 63 [71] (Kiefel J).

³⁴ Ibid 52 [37].

³⁵ Ibid 53 [39].

³⁶ Ibid 55 [42].

³⁷ Ibid 61–2 [65] citing *McCloy* (n 2) 213 [68]; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 324–5.

³⁸ *Murphy* (n 31) 88 [181].

Chordia deals with *Murphy* as a case in which there was no burden on constitutional rights.³⁹ However, on one view there was self-evidently a burden (a prohibition) on the exercise by one group of the very suffrage for which freedom of political speech is essential. Only Kiefel J applied proportionality analysis, and did so without expressly identifying the precise nature and extent of the burden.⁴⁰ There were six separate judgments in *Murphy* prepared by the same seven judges who sat in *McCloy*, suggesting that, in seeking to rely upon the proportionality analysis adopted in *McCloy*, counsel for the plaintiffs may have misjudged their court. Gageler J, who had expressed ‘reservations’ about proportionality analysis in *McCloy*,⁴¹ referred to the plaintiffs’ attempt ‘to shoehorn their argument within it’,⁴² and further stated:

Under the guise of inviting the Court to assess the rationality of the timing of the cut-off, to examine the availability of less restrictive alternative means of achieving its purpose, and to weigh the adequacy of its balance, the plaintiffs would have had the Court engage in a process of electoral reform. Through the application of an abstracted top-down analysis, they would have had the Court compel the Parliament to maximise the franchise by redesigning the legislative scheme to adopt what the plaintiffs put forward currently to be best electoral practice.⁴³

In a series of further cases involving the implied freedom of political communication, structured proportionality reasoning was applied in joint judgments of Kiefel CJ, Bell and Keane JJ, with separate judgments of Nettle J and Edelman J.⁴⁴ However, in a contemporaneous but separate publication, Chordia has described the 2019 decision in *Unions NSW v New South Wales*⁴⁵ as revealing that the High Court ‘is even further along in its path to retreating from an express acknowledgment of the value of structured proportionality analysis in this context’.⁴⁶

It is appropriate to return to the reasoning of the two members of the *McCloy* Court who rejected proportionality reasoning. Gordon J took the more conventional approach, seeing no reason to depart from the second test in *Lange* (as restated in *Coleman v Power*⁴⁷); namely, that the legislation must be ‘reasonably appropriate and adapted to serve a legitimate end’.⁴⁸ Her Honour continued:

But the two questions call for judgment. However expressed, identifying the relevant objects or ends of an impugned law and considering where those objects or ends can be classed as ‘legitimate’ is, and must be, a question for

³⁹ Chordia (n 4) 191–3.

⁴⁰ *Murphy* (n 31) 60 [60]–[61]; *ibid* 192 n 268.

⁴¹ *McCloy* (n 2) 235 [141].

⁴² *Murphy* (n 31) 72 [101].

⁴³ *Ibid* 73–4 [109].

⁴⁴ *Brown v Tasmania* (2017) 261 CLR 328 (‘*Brown*’); *Unions NSW v New South Wales* (2019) 264 CLR 595 (‘*Unions NSW* (2019)’); *Clubb v Edwards* (2019) 267 CLR 171; *Comcare v Banerji* (2019) 93 ALJR 900.

⁴⁵ *Unions NSW* (2019) (n 44).

⁴⁶ Shipra Chordia, ‘Proportionality and the New Postwar Juridical Paradigm: A Challenge to Australian Exceptionalism?’ in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 365.

⁴⁷ *Coleman v Power* (2004) 220 CLR 1, 50–51 [93], [95]–[96] (McHugh J).

⁴⁸ *McCloy* (n 2) 281–2 [309].

judgment. And considering whether that impugned law advances those legitimate objects or ends in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government also is, and must be, a question for judgment.⁴⁹

Gordon J further said that:

The method or structure of reasoning to which the plurality refers does not yield in this case an answer any different from that reached by the accepted modes of reasoning. It does not avoid the judgments that the two questions require and, as always, it is necessary to explain how and why those judgments are formed.⁵⁰

As Chordia observes, there is no avoiding the need for a balancing exercise.⁵¹ However, Chordia's statement that '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'⁵² may place too much weight on the distinction between the rejection of balancing and the acceptance of an evaluative judgment. In another passage, Gordon J echoed the dismissal by McHugh J in *Coleman v Power* of the criticism by Adrienne Stone that the tests adopted in *Lange* involved 'an "ad hoc balancing" process without criteria or rules for measuring the value of the means (the burden of the provision) against the value of the end (the legitimate purpose)'.⁵³ Gordon J continued in *McCloy*:

Because there are no criteria or rules by which a 'balance' can be struck between means and ends, the question is not one of balance or *value* judgment but rather whether the impugned law *impermissibly* impairs or tends to impair the maintenance of the constitutionally prescribed system of representative and responsible government having regard not only to the *end* but also to the *means* adopted in achieving that *end*.⁵⁴

To the extent that this analysis reflected that of McHugh J in *Coleman v Power*,⁵⁵ there is much to be said for Chordia's refusal to accept the response as other than a confirmation of the criticism that no criteria or standards have been established.⁵⁶ There is undoubtedly an evaluative judgment to be made; the question ultimately is whether structured proportionality provides a better basis for that exercise and its expression.

Chordia takes some care in addressing the objections raised by Gageler J in *McCloy* and *Brown v Tasmania*.⁵⁷ Dealing first with *McCloy*, Chordia treads carefully, describing his analysis as 'calibrated scrutiny'.⁵⁸ Gageler J raised two

⁴⁹ Ibid.

⁵⁰ Ibid 282 [311].

⁵¹ Chordia (n 4) 176–7.

⁵² Ibid 177.

⁵³ *Coleman v Power* (n 47) 46 [83] citing Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668.

⁵⁴ *McCloy* (n 2) 287–8 [336] (emphasis in original).

⁵⁵ *Coleman v Power* (n 47) 49–50 [91].

⁵⁶ Chordia (n 4) 176–7.

⁵⁷ *McCloy* (n 2); *Brown* (n 44).

⁵⁸ Chordia (n 4) 177–9; *McCloy* (n 2) 238 [150].

principled objections to what he identified as ‘a particular and prescriptive form of proportionality analysis’.⁵⁹ His Honour’s objections were as follows:

First, I am not convinced that one size fits all. In particular, I am not convinced that standardised criteria, expressed in unqualified terms of ‘suitability’ and ‘necessity’, are appropriate to be applied to every law which imposes a legal or practical restriction on political communication irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be.

...

Secondly, I am not convinced that to require a law which burdens political communication to be ‘adequate in its balance’ is to adopt a criterion of validity which is sufficiently focused adequately to reflect the reasons for the implication of the constitutional freedom and adequately to capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed.⁶⁰

Gageler J concluded with a reformulation of the second step in the *Lange* analysis as requiring a finding

that such restriction as each [impugned provision] imposes on political communication is imposed in pursuit of an end which is appropriately characterised within our system of representative and responsible government as compelling; and that the imposition of the restriction in pursuit of that compelling end can be seen on close scrutiny to be a reasonable necessity.⁶¹

His Honour continued:

In the application of that standard, much turns on identification of the precise nature and degree of the restriction which each of the impugned provisions imposes on political communication. Much also turns on the identification and characterisation of the end each is designed to achieve.⁶²

Chordia identifies the basis of the scrutiny required as reflecting the need to ensure that representative institutions are protected against the risks of abuse arising from majoritarian characteristics of the institutions, reflecting the approach of the US scholar John Hart Ely.⁶³ In the US, she notes, Ely’s theory has been criticised as ‘underinclusive’.⁶⁴ However, it is not entirely clear that this was a legitimate criticism with respect to cases specific to the implied freedom of political communication, nor that, if otherwise warranted, it was applicable to the approach of Gageler J.

In *Brown*, after a minor reformulation of the *Lange* test, Gageler J addressed proportionality analysis with specific reference to its history:

Though it originated within a civil law tradition, three-staged testing for proportionality ... has been found by some courts applying the methodology

⁵⁹ *McCloy* (n 2) 234 [140].

⁶⁰ *Ibid* 235 [142], 236 [145].

⁶¹ *Ibid* 239 [155].

⁶² *Ibid* 239 [156].

⁶³ Chordia (n 4) 180.

⁶⁴ *Ibid* 77, 181.

of the common law to be useful when undertaking constitutionally or statutorily mandated rights adjudication. The structure it imposes is not tailored to the constitutional freedom of political communication, which is not concerned with rights, and which exists solely as the result of a structural implication concerned not with attempting to improve on outcomes of the political process but with maintaining the integrity of the system which produces those outcomes. The first stage – ‘suitability’ ... – can be quite perfunctory if confined to an inquiry into ‘rationality’. The second – ‘necessity’ ... – is too prescriptive, and can be quite mechanical if confined to an inquiry into ‘less restrictive means’. The third stage – ‘adequacy of balance’ ... – even if the description of it as involving a court making a ‘value judgment’ conveys no more than that the judgment the court is required to make can turn on difficult questions of fact and degree, is too open-ended, providing no guidance as to how the incommensurables to be balanced are to be weighted or as to how the adequacy of their balance is to be gauged.⁶⁵

As to Gageler J’s first point (on the origins of proportionality analysis methodology), a great benefit of Chordia’s book is that it explains the background to the development of proportionality analysis in a way that allows one to assess whether its origin in a civil law jurisdiction (Germany), and its adoption of three-staged testing, renders it inappropriate as a method for reviewing legislation for constitutional validity in Australia. Like French CJ and Bell J in *Murphy*, Chordia has little sympathy for such a view. Further, to note that the methodology has been found ‘useful’ by common law courts implies acceptance that it is not inherently inconsistent with common law adjudication. Chordia deals with the circumstances in which it has been adopted in Canada and the UK.⁶⁶ Although it is said to have been adopted with respect to ‘rights adjudication’ (whether under a constitution or statute), there is some irony in the fact that it has not been adopted in the US, which has a constitution mandating rights in absolute terms to which limitations have been implied by the courts. (That ‘modern constitutions’ subject rights to express limitations that the courts must adjudicate is of limited importance.)⁶⁷

Gageler J’s second point (as to the structure imposed by three-stage proportionality testing) relies on the distinction between individual rights and a structural implication such as the protection of political speech. The distinction may be accepted, but its sufficiency as an objection to proportionality analysis remains in issue. Chordia states that the German Federal Constitutional Court, in considering the validity of legislation, has treated individual rights as drawn from, and as aspects of, ‘broader public goods and societal interests ... [and thus] has ensured that these rights are properly viewed as reflecting wider “principles” (or values) rather than as operating as more specific “rules” divorced from those values’.⁶⁸ There is a sense in which all human rights are a reflection of public values underpinning the political structure, of which the implied freedom of political communication is one.

⁶⁵ *Brown* (n 44) 376–7 [160] quoting *McCloy* (n 2) [2], [74]–[75] and citing *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 588 [149]; Frederick Schauer, ‘Proportionality and the Question of Weight’ in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 173, 177–8, 180.

⁶⁶ Chordia (n 4) 24–7.

⁶⁷ Iddo Porat, ‘Mapping the American Debate over Balancing’ in Huscroft, Miller and Webber (n 65) ch 17, 398.

⁶⁸ Chordia (n 4) 55.

Recognition as an individual human right is no more than a statement as to a potential mechanism of enforcement. The Australian emphasis on the implied freedom as a structural implication reflects the principle that limits on legislative power must be found in the written *Constitution*. The effect of applying the principle to invalidate a law is to protect an otherwise prohibited activity.

Gageler J's specific complaints refer to the 'perfunctory' nature of the first test, the argument that the second is 'too prescriptive' and can be 'quite mechanical', while the third step is said merely to establish that a judgment is required and is 'too open-ended'.⁶⁹ On one view, these characterisations understate the difficulties with proportionality analysis. The substantial objection to the second step is that it requires the identification of other less restrictive mechanisms for pursuing the legitimate purpose, which are more compatible with the constitutionally protected value and which are reasonably practicable. There is a significant literature with respect to the third step, which is said to involve weighing 'incommensurables'.⁷⁰ These objections, including Schauer's analysis referred to by Gageler J,⁷¹ are considered by Chordia.⁷²

There is another aspect of the history that may explain, in part, the antipathy to proportionality in Australia. Chordia records that structured proportionality reasoning was developed in the German Constitutional Court in order to deal with limitations on both legislative and executive power.⁷³ As explained by Cohen-Eliya and Porat, the German approach developed with a focus on judicial review of administrative action.⁷⁴ By contrast, the US developed its approach to review of legislation, based on its Bill of Rights,⁷⁵ before it developed a comprehensive and coherent set of administrative law principles.

In Australia, there has been resistance to proportionality reasoning in review of administrative action, based on its potential to loosen the constraints on review by reworking (or replacing) principles of manifest unreasonableness. The chronology in the Australian case law may be significant in this respect. In 2013, the High Court delivered judgment in three cases where reference was made to proportionality reasoning, namely *Monis v The Queen*⁷⁶ (freedom of communication by postal services); *Attorney-General (South Australia) v Adelaide City Corporation*⁷⁷ (validity of by-laws limiting free speech); and *Minister for Immigration and Citizenship v Li*⁷⁸ (review of administrative decision-making). The possibility of proportionality analysis was adverted to in *Li* by French CJ⁷⁹ and in

⁶⁹ See above n 64 and accompanying text.

⁷⁰ See above n 64 and accompanying text. See also Timothy Endicott, 'Proportionality and Incommensurability' in Huscroft, Miller and Webber (n 65) ch 14.

⁷¹ See above n 64 and accompanying text.

⁷² Chordia (n 4) 177–81.

⁷³ *Ibid.*

⁷⁴ Moshe Cohen-Eliya and Iddo Porat, 'The Administrative Origins of Constitutional Rights and Global Constitutionalism' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) ch 5.

⁷⁵ *United States Constitution* amends I–X.

⁷⁶ *Monis v The Queen* (2013) 249 CLR 92, 153 [144] (Hayne J).

⁷⁷ *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

⁷⁸ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*').

⁷⁹ *Ibid* 351–2 [30].

the joint reasons of Hayne, Kiefel and Bell JJ.⁸⁰ Proportionality reasoning was not adopted in the administrative law context in *Li*, but the joint reasons in *McCloy* appeared to adopt proportionality reasoning with respect to both legislative and administrative review.⁸¹ While strictly obiter dicta in *McCloy*,⁸² the reference to ‘administrative acts’ was repeated by French CJ and Bell J in *Murphy v Electoral Commissioner*.⁸³ This may have caused some discomfort on the part of members of the Court concerned at a more intense level of scrutiny of administrative decisions, a concern that led to repudiation of that view in *Minister for Immigration and Border Protection v SZVFW*, where, for example, Kiefel CJ affirmed that ‘the test for unreasonableness is necessarily stringent’,⁸⁴ although no member of the Court referred to *McCloy*.

IV Conclusions

Chordia’s book provides a comprehensive and well-written account of structured proportionality as a mechanism for determining the constitutional validity of legislation. The controversial status of proportionality analysis in Australian jurisprudence derives in part from its origins and its formal development by the German Constitutional Court. An understanding of that history is essential for engagement in the important debate currently underway as to its relevance and usefulness in Australian constitutional, and indeed administrative, law.

The book has, however, a further and more profound value. It leads us to question the importance of key principles of our constitutional law. In particular, it raises questions as to the categorisation of Commonwealth legislative powers by reference to either subject matter or purpose. Even subject-matter powers, such as those relating to aliens, may have purposive limitations, as suggested by the reasoning of the plurality in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.⁸⁵ Similarly, the analysis raises issues as to how one characterises a law with respect to a constitutional source of power. The standard test, asking whether there is a ‘sufficient connection’ between the law and the head of power, implies that an evaluative judgment is required. Whenever a law imposes a restriction, or otherwise adversely affects the interests of an individual, it is proper to ask whether there is an underlying value that is affected. If there is, it may be necessary to weigh the degree of connection with the subject matter against the intrusion on an individual.

Chordia addresses proportionality in considering the distinction between purposive and other powers, its value in characterisation, and also its relevance to

⁸⁰ Ibid 366 [73].

⁸¹ *McCloy* (n 2) 195 [3] (French CJ, Kiefel, Bell and Keane JJ). See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) [6.520]–[6.530].

⁸² See Aronson, Groves and Weeks (n 81) [6.530].

⁸³ *Murphy* (n 31) 49–50 [32] citing *McCloy* (n 2) 195 [3] (French CJ, Kiefel, Bell and Keane JJ).

⁸⁴ *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 551 [11] citing *Li* (n 78) 376 [108].

⁸⁵ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 32 (Brennan, Dean and Dawson JJ). See also at 57 (Gaudron J); Chordia (n 4) 107–8.

the Court's jurisprudence on s 92 of the *Australian Constitution* and the freedom of interstate trade and commerce.⁸⁶ This is an area in which, in the past, the High Court has largely relied upon conclusory labels without clear articulation of standards, criteria or values which are being applied. Sometimes labels (such as 'manifest unreasonableness' or 'strict scrutiny') convey all that can be conveyed; however, exercises in weighing different interests against each other are not value-free. In construing legislation, the High Court is sensitive to possible intrusions on interests variously described as fundamental principles and human rights and freedoms, now labelled the 'principle of legality'. Increased transparency as to the values at stake and the standards being applied has much to recommend it.

Proportionality reasoning is a topic that public lawyers can no longer avoid. What it encompasses and how it works are by no means closed issues. Empirical research in this area is a new phenomenon: the first significant report of such research, funded by the European Research Council, was published only last year.⁸⁷ We can expect further studies of the operation of proportionality analysis in countries closer to home, including by courts in Hong Kong and Macau.⁸⁸ Chordia's book is an excellent contribution to this burgeoning area of legal study: both she and The Federation Press are to be congratulated on its production and publication.

⁸⁶ Chordia (n 4) chs 6–7.

⁸⁷ Mordechai Kremnitzer, Talya Steiner and Andrej Lang, *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press, 2020).

⁸⁸ See, eg, Albert HY Chen and PY Lo, 'The Constitutional Orders of "One Country, Two Systems": A Comparative Study of the Visible and Invisible Bases of Constitutional Review and Proportionality Analysis in the Chinese Special Administrative Regions of Hong Kong and Macau' in Rosalind Dixon and Adrienne Stone (eds) *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) ch 8.

