Proportionality and Federalism: Can Australia learn from the European Community, the US and Canada?

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I. Introduction

It is widely acknowledged that the jurisprudential pattern of the Australian High Court has operated to increase the power of the Commonwealth in the federation,¹ almost certainly beyond what was ever intended by its framers. Following the decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd.*,² the majority of the Court has refused to interpret the *Australian Constitution* in a manner which incorporates implied limitations based on federal notions. Whilst some implications flowing from the constitutional fact of federation have re-entered the judicial landscape,³ the use of ‘federal balance’ in determining the breadth of Commonwealth power is viewed with disdain.⁴ This type of judicial methodology has implications for the existence of the States as relevant units with the ability to develop and implement policies rather than mere service providers of the Commonwealth. As Zines points out, it is:

unbelievable, having regard to the attention given to the States in the Constitution, that they were (with their parliaments, vice-regal

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² (1920) 28 CLR 129 (‘Engineers’).

³ The limited immunity of States from Commonwealth laws was developed by Dixon J and accepted in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. For the most contemporary restatement of the principle see *Austin v Commonwealth* (2003) 215 CLR 185, 249 (Gaudron, Gummow and Hayne JJ). The immunity of the Commonwealth from State laws was also developed by Dixon J and accepted in *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 and most recently in *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex Parte Defence Housing Authority* (1997) 190 CLR 410.

representatives and express limitations on their powers) to be left as impotent government ornaments with plenty of glory and no power.\(^5\)

This paper explores whether the increasingly accentuated drift to the centre may be stopped through the introduction of a more general test of proportionality in the determination of the constitutionality of Commonwealth legislation. Variants of this method of judicial interpretation have been picked up in the Supreme Courts of both Canada and the United States and the European Court of Justice.

A broader use of proportionality to ensure the maintenance of federal values in Australia's current legal climate faces several challenges. In *Work Choices* a majority of the High Court affirmed a line of jurisprudence rejecting the general use of proportionality in characterisation of Commonwealth laws.\(^6\) That said, proportionality in its more ubiquitous form – reasonably 'appropriate and adapted' for the achievement of a legitimate governmental objective – is not heretical to our judicial methodology. Borrowing predominantly from European jurisprudence,\(^7\) the High Court has readily employed it in the interpretation of express and implied rights. The use of proportionality in Australia in relation to implied rights has attracted criticism from within the academy. The underdeveloped nature of the proportionality test used by the Court underlies this criticism. The Court has also dabbled with the use of proportionality in characterisation where the head of power is purposive.

The use of proportionality to protect State rights in the federation could be accused of falling into a 'reserved powers' trap, a theory of interpretation consistently rejected by the High Court. There are, however, alternative theses on which to base proportionality which still address the federal issue. Drawing on the European experience, this paper discusses proportionality based on a notion of protecting an individual's right to be governed by the appropriate level entity within the federation (ie at local, State or federal level). One attraction of this mechanism lies in its flexibility. Using federal values within a balancing exercise allows the federation envisaged by the *Australian Constitution* to be adaptable as Australian society and its government develop and adapt to contemporary circumstances.

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\(^5\) Leslie Zines, *The High Court and the Constitution* (4th ed, 1997), 12. See also *Work Choices* (2006) 229 CLR 1, [549] (Kirby J) where his Honour asserted the States should not be reduced to the 'service agencies of the Commonwealth' and [779] (Callinan J) whose own opinion mirrored this sentiment, stating that the States could not be allowed to become 'impotent debating societies'.


\(^7\) Particularly the jurisprudence of the European Court of Human Rights, but also the Canadian Supreme Court jurisprudence.
Many judges have expressed reluctance to use proportionality because it would require them to exercise power which requires discretionary and policy based decisions traditionally viewed as within the jurisdiction of the legislature and executive. This paper looks at the breadth of usage of the principle elsewhere, including in foreign and regional jurisdictions, to indicate that such an argument is shallow at best.

The aim of this paper is to introduce the idea that proportionality can be incorporated into Australian constitutional methodology as a standard of review to protect federal benefits and values. The standard of review itself (that is, the form of the proportionality test) necessarily informs this discussion. To be clear, the purpose of the paper is not to determine the appropriate standard of review, rather, it is to raise the suggestion that such a standard of review is necessary and viable in Australia. This paper will proceed as follows. First, the reasons for and the nature of a broader use of proportionality will be briefly outlined. Then, the current use of proportionality in Australia (particularly its limited use in characterisation of Commonwealth legislation) will be analysed including the various analyses that have been made of it. Next, the paper will discuss the use of proportionality to protect ‘federal’ structures in the European Community, the United States, with respect to the ‘necessary and proper’ clause (art I § 8 of the United States Constitution) and under amend XIV, § 5, and the Canadian concept of ‘rational connection’ in characterisation of both federal and provincial legislation. Finally, the theory underlying a general principle of proportionality and the critiques made of proportionality will be considered to see whether such a test could be a plausible mechanism of review by the Australian High Court.

II. Proportionality and Characterisation: A Suggested Limit

In Australia, proportionality is used in our limited constitutional rights jurisprudence and in characterisation of purposive powers. This paper suggests a broader use of the proportionality test in characterisation. The purpose of this part is to briefly outline the reasons for and the basis of the test proposed. The final part of the paper analyses the objections to a broader use in further depth to argue that such a test is viable in Australia.

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10 See Part III, below, for discussion of proportionality in Australia.
Proportionality is not employed as a principle in its own right.\textsuperscript{11} It is necessary only when there are competing factors which balance against each other. Proportionality involves rationes or relationships between matters.\textsuperscript{12} There must always be a counterbalancing interest or right against the legitimate government objective for proportionality to have any application.\textsuperscript{13} To use rights based jurisprudence as an example, protection of individual rights balances against the government’s ability to employ any means whatsoever to achieve governmental objectives. To ensure the intrusion into individual rights is as little as necessary to achieve the governmental objective, the court will look at its proportionality.

Balancing legitimate federal governmental objectives against ‘State rights’ is conceptually different and therefore more difficult. In Australia, the concept of ‘reserved powers’ belonging to the States has been rejected since the decision in \textit{Engineers’}. It was based upon an idea of the correct role of the States and the Commonwealth in a federation and a notion that some competencies were intended to be ‘reserved’ to the States. The Commonwealth was only given the power to enter into these competencies if expressly or necessarily granted.\textsuperscript{14} This doctrine has been consistently rejected by the courts.\textsuperscript{15}

A threshold question that must be considered in any thesis which advocates maintaining the State’s role in the Australian federation is whether the proposed interpretative methodology is really just ‘reserved powers’ by another name. It is not the intent of this paper to attack the High Court’s rejection of the doctrine. The decision in \textit{Engineers’} has not been subjected to serious High Court challenge recently and it appears unlikely in the current jurisprudential climate any such challenge could be successful.\textsuperscript{16} Efforts have been made by the judiciary to distinguish contemporary use of proportionality methodology from the reserved powers doctrine, at least superficially.

\begin{itemize}
\item[12] Ibid, 3.
\item[13] Ibid, 27.
\item[14] See, eg, \textit{R v Barger} (1908) 6 CLR 41, 67 (Griffiths CJ, Barton and O’Connor JJ).
\item[15] Both in Australia, and in the United States, from which the framers took the Australian federal model.
\end{itemize}
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The United States Supreme Court in *City of Boerne v Flores*,17 held that federal powers under the enforcement power (amendment XIV § 5),18 could not intrude into 'traditional areas of state responsibility, a power inconsistent with the federal design of the Constitution.'19 However, this still looks very much like a 'reserved powers’ test – giving pre-defined areas of exclusive competence to the States. Jackson criticises the theoretical basis for extending proportionality to protect State interests in a similar manner to individual rights.20 She is quite critical of conceiving State legislative competence as a right.21 In the United States, as in Australia, State governmental power is generally considered to be a 'residue' defined by reference to the exercise of federal power. It is flexible and can change over time. Therefore, the analogy with individual 'rights' becomes weak.22

The notion of powers reserved to the States is inimical to the distribution of federal powers adopted by Australia, by which the scope of the States’ powers are necessarily dependent upon the federal powers and therefore not capable of predefinition.23 But there is a significant distinction between rejecting this notion and rejecting a fundamental principle on which the federal Constitution is based – the vertical distribution of power. Flexibility in our federal system is essential (which the ‘reserved powers’ doctrine did not provide) but not at the expense of the federal system itself. This paper therefore proposes a manner by which this type of flexibility can be achieved.

The European Court of Justice jurisprudence demonstrates that the concept of proportionality is not necessarily predicated on the doctrine of ‘reserved powers’ or *State* rights.24 The European Court protects the right of subsidiarity (that is, matters ought to be handled by the lowest competent authority, ie member states) in its balancing exercise.25 Another way of looking at subsidiarity is the *right of citizens* in a federal-

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17 521 US 507 (1997) ('Boerne').
18 Discussed at Part IV B, below.
20 Vicki C Jackson, ‘Being Proportional about Proportionality: The Ultimate Rule of Law’ (2004) 21 Constitutional Comment 803, 843. She says, for example, that representation in the Senate is a negotiated agreement that lends little room for challenges on the basis of proportionality.
22 See also Jeremy Kirk, above n 11, 36.
23 This can be contrasted with the federal structure adopted in Canada, discussed at Part IV C, below, and rejected by the Australian framers.
24 cf Jeremy Kirk, above n 11, 36.
25 See Part IV A, below.
type system to be regulated by the appropriate level of government.\textsuperscript{26} Whilst the \textit{Treaty of Rome} expressly incorporates the principle of subsidiarity the concepts behind it are reflected in the very idea underpinning federal systems: there are advantages to be gained by the citizen through the decentralisation of governmental power.

This conception of what is being ‘balanced’ is consistent with the comments of the United States Supreme Court in \textit{New York v United States}:

> The Constitution does not protect the sovereignty of States for the benefit of States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.\textsuperscript{27}

And the recent comments of Kirby J in \textit{O'Donoghue v Ireland}:

> [T]he federal division of powers and responsibilities, although sometimes inconvenient and inefficient, affords important protections for the people of the Commonwealth. It ensures that, to the stated extent, government is decentralised and more responsive to electors than it would be in a unitary state, operating in a country of continental size. In addition, it tends to protect the liberties of the people by dividing governmental power. History, and not just ancient history, demonstrates that centralisation of governmental power can operate inimically to freedom. Modern technology has a tendency to centralise power. The federal form of government is a beneficial antidote.\textsuperscript{28}

\textit{(emphasis added)}

De Q Walker lists a number of advantages that federalism provides to the individual, including:

- the right of choice and exit – federalism gives citizens the ability to choose where they live and move between regions;
- the possibility of experiment – federalism allows and encourages experimentation and diversity on political, social and economic matters for the benefit of citizens. It also provides ease of comparison between policies;
- accommodation of regional preferences and diversity – federalism allows flexibility to accommodate local differences and needs amongst individuals and communities;

\textsuperscript{26} Jeremy Kirk, above n 11, 27. In light of the jurisprudence of the High Court, basing proportionality on an implied individual right is more likely to gain traction than any principle based upon the federal system.

\textsuperscript{27} 505 US 144 (1992), 181. See also Laurence H Tribe, \textit{American Constitutional Law} (3\textsuperscript{rd} ed, 2000), 858-859.

\textsuperscript{28} (2008) 244 ALR 404, [89] (Kirby J). See also \textit{Work Choices} (2006) 229 CLR 1, [555] and [612] (Kirby J).
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- increased participation in government – federalism fosters greater democratic participation of the citizen through more levels of representative government; and
- protection of liberty – the decentralisation of power in a federal system reduces corrupt and arbitrary rule over the citizen, providing an additional check and balance.29

If federalism exists to both protect the individual and provide additional democratic rights it can (and should) be used in a federal proportionality test. The use of central power is balanced against the countervailing right of citizens to be governed by the appropriate level of government in the federation, just as it is used in European jurisprudence.

III. Proportionality in Australia

A. Proportionality origins and rights jurisprudence

Judicial use of proportionality has its origins in European, particularly German, human rights jurisprudence. The German model of proportionality has become an underlying (albeit unwritten) constitutional principle limiting both administrative and legislative powers.30 The test for proportionality is broken down into three sub-principles: suitability of a measure for the attainment of the objective (geeignet), the necessity of the measure (erforderlich, notwendig) – a measure is permissible only if no less restrictive method is available for the achievement of the legitimate end pursued, and proportionality stricto sensu (verhältnismässig) – the seriousness of the intervention and the gravity of the reasons justifying it must be proportionate to each other.31 In Germany, the main function of the principle lies in the protection of the basic rights (Grundrechte) in the Basic Law (Grundgesetz).32 The Canadian Supreme Court has adopted a similar test since the adoption of the Charter of Human Rights in Canada in 1982.33

32 Nicolas Emiliou, above n 31, 23; Elizabeth Zoller, above n 31, 582.
Australia has come late to the proportionality principle. However, over the previous two decades, the High Court has readily adopted the use of a proportionality-type test in the arena of constitutional guarantees, freedoms and immunities. Whilst the concept has entered Australian jurisprudence through Europe, its precise content has not yet been as developed. The Court has not adopted the logic of the three-step test used both in Germany and Canada or something similar. It has been described as ‘theoretically vague’, and has been subjected to robust academic critique.

The High Court unanimously adopted a loose proportionality-type test in *Lange v Australian Broadcasting Corporation* when considering infringement of the implied freedom of communication on governmental and political matters. The first limb concerns whether the law does in its terms, operation or effect burden political communication. The second limb then asks whether the law is ‘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 and the procedure prescribed by s 128 ... ’

A similar formulation of the test has been adopted elsewhere. Most recently, in holding that there is an implied ‘right’ to political participation in federal elections in the *Australian Constitution*, the joint judgment of Gummow, Kirby and Crennan JJ in *Roach v Electoral Commission* adopted a proportionality test. Their Honours held that legislative disqualification from what otherwise is adult suffrage must require a ‘substantial reason’. That is, ‘if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the

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34 Justice Gummow in *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565, 575 notes that proportionality appears to have entered Australian common law through Europe.
37 (1997) 189 CLR 520.
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Stone has provided extensive analysis of the current usage of the proportionality test in the free speech cases. She starts from a proposition that if proportionality is to be adopted the standard of review must be resolved as an important issue. The High Court must decide what level of judicial discretion is appropriate when determining proportionality. The Australian cases indicate that the Court has generally adopted the European and Canadian style balancing tests (the three step test, set out above), albeit not explicitly. She refers to these as ‘ad hoc’ balancing tests.

However, she notes that some members of the Court have indicated both pre- and post-\textit{Lange} that there may be differing standards of review that attach to different types of law – for example Mason CJ and McHugh J draw a distinction between ‘restrictions on communication which target ideas or information and those which restrict an activity or mode or communication by which ideas or information are transmitted.’ The former must satisfy a more stringent proportionality test than the latter. A more sophisticated version of this ‘rule based’ proportionality has been used extensively in the United States First Amendment free speech cases.

Stone argues that both the rule based and ad hoc balancing tests necessarily involve judicial discretion, but that rule based proportionality tests should ultimately be preferred. She argues that ad

\begin{footnotes}
\footnote{{\textsuperscript{40}} Ibid, [85] (Gummow, Kirby and Crennan JJ). See also [8] (Gleeson CJ) who said an ‘arbitrary’ exception would be inconsistent with the Constitution.}
\footnote{{\textsuperscript{41}} It should be noted that Stone undertook the analysis to demonstrate her thesis that the text and structure interpretative theory adopted unanimously in \textit{Lange} (1997) 189 CLR 520 is unsustainable as an interpretative theory.}
\footnote{{\textsuperscript{42}} Adrienne Stone, above n 36, 670-671. See also Elisa Arcioni, above n 36, 386-388 where it is suggested that the High Court may have an opportunity in \textit{Coleman} to elucidate the standard of review in the proportionality test as the current test has a low predictive value. Various considerations in doing this are proposed.}
\footnote{{\textsuperscript{43}} Adrienne Stone, above n 36, 678, 682-683.}
\footnote{{\textsuperscript{44}} Ibid, 678 referring to \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, 143 (Mason CJ), 234-235 (McHugh J). See also \textit{Nationwide News v Wills} (1992) 177 CLR 1 (‘\textit{Nationwide News}’), 76-77 (Deane and Toohey JJ) where their Honours refer to slightly different categories which may require different standards of review. Stone asserts that the principle reemerged in \textit{Levy v Victoria} (1997) 189 CLR 579 in the judgments of Gaudron and Kirby JJ.}
\footnote{{\textsuperscript{45}} Adrienne Stone, above n 36, 688.}
\footnote{{\textsuperscript{46}} Ibid, 686.}
\end{footnotes}
hoc balancing fails to provide guidance to judges,\textsuperscript{47} reduces consistency, undermining fundamental principles of the rule of law, and produces errors in judgments.\textsuperscript{48} She also suggests that any ad hoc balancing test will, because of its operation in a precedential setting, eventually develop rules whereby certain types of laws are subject to differing levels of scrutiny.\textsuperscript{49} Rule based proportionality gives judges guidance as to the relative weight to be given to the right or the government objective in each circumstance.\textsuperscript{50}

Her critiques were addressed by McHugh J in \textit{Coleman v Power}.\textsuperscript{51} His Honour denied that any ad hoc balancing was involved in the two limbed test of \textit{Lange}.\textsuperscript{52} He asserted that the question was not a balancing one but simply whether

the federal, State or Territory law is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political or governmental matters.\textsuperscript{53}

Justice McHugh went on to concede that the reasonably appropriate and adapted test did give a ‘margin of choice’ to legislatures ‘as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications.’\textsuperscript{54} But the burden on communications would not be tolerated if it was ‘unreasonably greater than is achievable by other means’.\textsuperscript{55} This was not an impermissible balancing exercise for McHugh J, but rather an example of judicial method, where judges must make judgments as to the application of rules or principles of law.\textsuperscript{56} Stone has continued to assert her criticisms.\textsuperscript{57}

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid, 691.
\textsuperscript{49} Ibid, 702.
\textsuperscript{50} Ibid, 686.
\textsuperscript{51} (2004) 220 CLR 1, 46 (McHugh J).
\textsuperscript{52} Ibid, 48 (McHugh J).
\textsuperscript{53} Ibid, 49 (McHugh J).
\textsuperscript{54} Ibid, 53 (McHugh J).
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid. HP Lee says that differences in judicial opinion in the application of tests that have some value decisions associated with them in cases which do not fall at the extreme opposites of the legal spectrum ‘should not provide justification for condemnation of the judicial process’: HP Lee, ‘The Reasonably Appropriate and Adapted’ Test and the Implied Freedom of Political Communication’ in Matthew Groves (ed), \textit{Law and Government in Australia} (2005), 59, 81.
\textsuperscript{57} Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 \textit{University of New South Wales Law Journal} 842. Note that Aroney argues that McHugh J is in fact limiting the High Court’s test of proportionality to the first two parts of the proportionality test used in European and Canadian jurisprudence, suitability of the measure to achieve the end and necessity (that is whether a less restrictive means is available) and not the third, proportionality \textit{stricto sensu}. Aroney
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The discussion above throws light on the desirable form that a proportionality test in characterisation should take. Although this is not the focus of this paper it is nonetheless useful in determining whether proportionality could be employed in Australian constitutional method, discussed in more depth at Part V.

B. Proportionality and characterisation

Adopting the United States model of federalism, the Australian Constitution limits the powers of the Commonwealth by enumerating them in ss 51 and 52 and leaving, by implication, the residue to the States. In determining the constitutional validity of Commonwealth legislation the court must undertake an exercise in characterising that legislation as ‘with respect to’ one of the federal subject matters. In deciding upon the United States model of federalism over the Canadian model, the framers had to determine which subject matters were to be surrendered by the colonies to the Commonwealth. Sir Samuel Griffith said that the test to be applied should be whether it is ‘necessary, or incidental to the power and authority of the federal government’ or ‘necessary for its good order and government’.

However, the High Court has recently affirmed that, except in limited circumstances, the notion of proportionality to the subject matter within power has no role to play. The majority in Work Choices said:

Finally, as remarked in Grainpool of Western Australia v Commonwealth, ‘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.’

Work Choices affirmed a line of authority which had been advocated by Dawson J and culminated a decade previously in the judgments of Leask and Cunliffe that the test of proportionality is to be used for determining characterisation under purposive powers only. Justice

seeks to demonstrate that it is only the third part which requires impermissible ‘balancing’: Nicholas Aroney, ‘Justice McHugh, Representative Government and the Elimination of Balancing’ (2006) 28 Sydney Law Review 505, 532.

58 Outlined at IV C, below.


60 Ibid., 523.


63 (1994) 182 CLR 272, 356.
Dawson’s battle over the correct role of proportionality had been waged with Mason CJ since the decision in *Nationwide News*.64

Chief Justice Mason, writing extra-curially in 1992, stated his position (and perhaps vision) in the foreword to *Australian Constitutional Perspectives*:

Professor Lee draws attention to the concept of proportionality and indicates that reasonable proportionality may operate as a form of constraint on the growth of central power sought to be promoted through the invocation of s 51(xxxxix). No doubt he is right in drawing attention to this possibility. But it is equally possible that the concept of proportionality may operate as a form of constraint on the growth of central power beyond the realm of external affairs.65

In *Nationwide News* four members of the Court held the impugned legislative provision invalid on the basis that it infringed an implied freedom of communication on government and political matters.66 Chief Justice Mason was prepared to take a wide view of the application of proportionality in characterising federal legislation. His Honour said:

this Court has held that, in characterising a law as one with respect to a permitted head of power, a reasonable proportionality must exist between the designated object of purpose and the means selected by the law for achieving that object or purpose. The concept of reasonable proportionality is not an accepted test of validity on the issue of *ultra vires*. It is a test which governs the validity of statutes as well as that of regulations.67

Whilst Mason CJ was referring to the operation of the implied incidental power, his comments do not appear to be limited as such. However, his judgment goes on to note that the test of proportionality is relevant only where legislation does not fall ‘fairly and squarely’ within the core of the subject matter. In that case, the implied incidental power will support legislation which is necessary to pursue the main purpose or object of the substantive power.68

Chief Justice Mason predicated his views on his interpretation of the earlier case of *Davis v Commonwealth*.69 His Honour said that the case established two propositions:

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64 (1992) 177 CLR 1.
65 H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992), vi.
66 Brennan, Deane, Toohey and Gaudron JJ. The remaining judges (Mason CJ, Dawson and McHugh JJ) held that there was an insufficient connection to the interstate conciliation and arbitration power (s 51(xxxv)) and the incidental power (either express in s 51(xxxxix) or implied).
68 Ibid, 27 (Mason CJ).
69 (1988) 166 CLR 79.
First, that even if the purpose of a law is to achieve an end within power it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, ie, unless it is capable of being considered to be reasonably proportionate to the pursuit of that end.

Secondly in determining whether the requirement of reasonable proportionality is satisfied it is material to ascertain whether and to what extent the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object to be obtained and in so doing causes adverse consequences unrelated to the achievement of the object. In particular it is material to ascertain whether the adverse consequences result in an infringement of fundamental values traditionally protected by the common law such as freedom of expression.70

( emphasis added)

Chief Justice Mason developed his arguments in Cunliffe.71 His Honour held that the relevant part of the Migration Act 1958 (Cth) fell within the substantive operation of the aliens and migration heads of power,72 but nonetheless made several comments on the use of proportionality in characterisation. Proportionality should be employed when ‘faithful pursuit of purpose’ is relevant to characterisation.73 This included the implementation of a treaty under the external affairs power,74 legislation enacted pursuant to the incidental power and where the validity of a law was sought to be sustained on the ground that it was designed to achieve an end within power, even though it operated on a subject matter beyond power.75 There was a need to ensure that a law did not necessarily or disproportionately regulate matters beyond power under the guise of protecting or enhancing the legitimate end in view.76

In Nationwide News, Dawson J wrote a strong counter-judgment to Mason CJ. Whilst his Honour similarly found the legislation to be beyond the legislative competence of the Commonwealth, he made it clear that he was looking only to the sufficiency of connection with the subject matter, and not to proportionality.77 His Honour said:

Thus, notwithstanding the immediate operation of the law, if its end lies within the scope of the power, then there will ordinarily be a sufficient connexion to support the law. But it is a question of there being a sufficient

70 Nationwide News (1992) 177 CLR 1, 30-31 (Mason CJ).
72 Sections 51(xix) and (xxvii) of the Australian Constitution.
73 Cunliffe (1994) 182 CLR 272, 296.
74 Section 51(xxix) of the Australian Constitution.
75 Cunliffe (1994) 182 CLR 272, 296.
76 Ibid, 298.
77 Nationwide News (1992) 177 CLR 1, 85-86 (Dawson J).
connexion between the law and the subject matter of the power, not whether the means adopted to achieve the end are appropriate or desirable.\(^{78}\)

He cited with approval the famous passage of Kitto J in *Herald & Weekly Times Ltd v Commonwealth* that disproportionality of the means 'affords no ground of constitutional attack.'\(^{79}\) However, to say his Honour rejected proportionality is deceptively simplistic. He went on:

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 connexion between the law and a relevant head of power. The question is essentially one of connexion, not appropriateness or proportionality, and where a sufficient connexion is established it is not for the Court to judge whether the law is inappropriate or disproportionate.\(^{80}\)

This distinction appears difficult to follow. Justice Dawson criticised the use of the proportionality test in characterisation, but then purported to include it as an element in determining characterisation (sufficient connection). His Honour indicated that *only in some instances* would it be a factor in determining characterisation. What are these instances? His Honour used by example the decision in *Davis v Commonwealth* where the Court struck down legislation on the basis it was not proportionate to a constitutional end (the celebration of Australia’s bicentenary).\(^{81}\) Justice Dawson also expressly stated another exception to his general rule was where a purposive head of power (such as the defence power) was relied upon.\(^{82}\) These combined examples probably reflect the only instances in which Dawson J would see proportionality as relevant: where constitutionality rests on legislation being for the *purpose* of achieving a constitutional end and under the purposive powers.

His Honour continued to reject a broader use of proportionality in *Cunliffe*.\(^{83}\) He continued to draw the distinction between proportionality which would take legislation to a point beyond which there would be no ‘sufficient connection’ and a general test of proportionality.\(^{84}\) In his judgment in *Leask*, Dawson J makes stinging criticisms of the use of foreign jurisprudence on proportionality in Australia.\(^{85}\) For example, he

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\(^{78}\) Ibid, 88 (Dawson J), citing with approval *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon J).

\(^{79}\) Ibid, 88 (Dawson J), citing with approval *Herald & Weekly Times Ltd v Commonwealth* (1965) 155 CLR 418, 436 (Kitto J). This sentiment is also reflected in *Singh v Commonwealth* (2004) 222 CLR 322, 384 (Gummow, Heydon and Hayne JJ).

\(^{80}\) *Nationwide News* (1992) 177 CLR 1, 88 (Dawson J).

\(^{81}\) (1998) 166 CLR 179, 100 (Mason CJ, Deane and Gaudron JJ).

\(^{82}\) Ibid, 89 (Dawson J).

\(^{83}\) (1994) 182 CLR 272, 355.

\(^{84}\) Ibid, 359.

makes it clear that the context for using proportionality in Europe emerged as part of the principle of subsidiarity which does not apply in Australia. The correctness of his Honour’s views on the use of foreign jurisprudence is addressed below. Justices McHugh and Gummow substantively agreed with Dawson J’s approach.86

Justice Toohey confined the use of proportionality to where the Court is balancing two operative principles – where legislative power is in tension with constitutional rights.87 Justice Gaudron gave some hope for a wider view of proportionality:

... it is one of several considerations that may be taken into account in determining purpose, whenever that is in issue and for whatever reasons, and, also, in determining whether a law is relevantly connected with a particular subject or with a head of constitutional power.88

These tensions in opinion have been swept away by the unanimous judgment in Grainpool.89 It remains the majority view that proportionality in characterisation is limited to the purposive and, perhaps, the incidental power.90

What then are the purposive powers? Two types of power are generally considered as such – the defence power91 and the treaty implementation aspect of the external affairs power.92 In Stenhouse v Coleman,93 Dixon J explained the difference between purposive and non-purposive powers. Non-purposive powers have subject matters described ‘by reference to a class of legal, commercial, economic or social transaction or activity’ such as the trade and commerce, banking or marriage powers, or ‘by specifying some class of public service’ such as postal installations and lighthouses, or ‘undertaking or operation’ such as railway construction or ‘by naming a recognized category of legislation’ such as taxation and bankruptcy. Comparatively, purposive powers authorise the Commonwealth to take such measures as are proportionate to the purpose of the power, for example, the defence power.94

86 Ibid, 616-617 (McHugh J), 624 (Gummow J).
87 Ibid, 614 (Toohey J).
88 Ibid, 614 (Gaudron J).
89 Extracted above.
90 In either its implied or express form (s 51(xxxix) of the Australian Constitution).
91 Section 51(vi) of the Australian Constitution.
92 Section 51(xxix) of the Australian Constitution.
93 (1944) 69 CLR 457.
The treaty implementation aspect of the external affairs power also involves a question of whether the legislation is ‘reasonably capable of being considered appropriate and adapted to implementing the treaty.’\textsuperscript{95} It is generally considered to be at least quasi-purposive so that legislation must be proportionate to the purpose of implementing the treaty obligations. The proportionality limb of treaty implementation was engineered by Deane J in the \textit{Tasmanian Dams Case}\textsuperscript{96} and \textit{Richardson v Forestry Commission},\textsuperscript{97} before being adopted by a majority of the Court.

Justice Deane in the \textit{Tasmanian Dams Case} and \textit{Richardson} indicated that the use of proportionality was to salvage some remnant of the federal compact of the 19\textsuperscript{th} century. After establishing the test that there must be proportionality between the legislation and the purpose (treaty implementation) in the \textit{Tasmanian Dams Case}, his Honour noted of the legislation challenged in \textit{Richardson}:

\begin{quote}
... there has been no real effort to confine the prohibitions of the overall protective regime, with the overriding of the ordinary rights of citizens and the ordinary jurisdiction of the State of Tasmania which it would involve, to activities which it might be thought represented some real actual or potential threat ... to natural or cultural heritage.\textsuperscript{98}
\end{quote}

As such, Deane J was enunciating a test of proportionality that required a triparte balancing exercise – the legitimate governmental objective must be balanced against its effect on the ordinary rights of the citizen and the ordinary jurisdiction of the States.

In the \textit{Tasmanian Dams Case} Gibbs CJ commented that the external affairs power differed from other powers because of its capacity for almost unlimited expansion. Such expansion would render the limitations placed on federal power by the enumerated subject matters meaningless. His Honour made it clear that he was not heralding a return to the doctrines of reserved powers but the Court must ensure that heads of power were not interpreted in a manner as to give them limitless operation and thereby dissolve the federal nature of the \textit{Australian Constitution}.\textsuperscript{99} His Honour was discussing the scope of the treaty implementation power where the subject matter itself was not of an international character, or international concern. However, he also noted that conformity (proportionality) with treaty obligations was another way

\textsuperscript{96} (1983) 158 CLR 1.
\textsuperscript{97} (1988) 164 CLR 261 (‘Richardson’).
\textsuperscript{98} \textit{Richardson} (1988) 164 CLR 261, 317 (Deane J). See also 303-304 (Wilson J).
\textsuperscript{99} \textit{Tasmanian Dams Case} (1983) 158 CLR 1, 99-100 (Gibbs CJ). See also 197 (Wilson J) and \textit{Koowarta v Bjelke-Petersen} (1982) 153 CLR 168, 198 (Gibbs CJ), 252 (Wilson J).
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in which federal power could be limited.\textsuperscript{100} Whilst the majority of judges have adopted the proportionality test, the theory of balancing federal and state interests in the judicial determination of the test has not found favour with other judges.\textsuperscript{101}

In \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs},\textsuperscript{102} Gaudron J also suggested the use of proportionality in the interpretation of the aliens power. It appears that her Honour was treating the power as similar yet different to a purposive power: she said that the power is given for the purpose of regulating entry or facilitating departure as and when required. Although note that her Honour says that ‘people’ powers were conceptually different from both purposive and general subject matter powers.\textsuperscript{103} In any event, her Honour uses the proportionality principle in characterising the legislation:

That a law imposing special obligations or disabilities on aliens 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 ... a valid law under s 51 (xix) of the Constitution.\textsuperscript{104}

However, this seems to have lost favour after the decision of \textit{Al-Kateb v Godwin}.\textsuperscript{105} The majority held that if the constitutional authority for immigration detention falls directly within the subject matter in the aliens power, the relevant law does not need to be ‘appropriate and adapted’.\textsuperscript{106}

Outside the constitutional arena, the courts have used proportionality to determine whether delegated legislation is \textit{ultra vires} empowering legislative provisions.\textsuperscript{107} Thus, in \textit{South Australia v Tanner} the parties accepted that the reasonable proportionality test of validity should be applied – that is whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of any enabling purpose.\textsuperscript{108} Justice Brennan however went to lengths to point out that any analogy between characterisation of delegated legislation and constitutional characterisation was flawed:

\textsuperscript{100} \textit{Tasmanian Dams Case} (1983) 158 CLR 1, 104 (Gibbs CJ).
\textsuperscript{101} See, eg, ibid, 128 (Mason CJ), 221-222 (Brennan J), 302 (Dawson J).
\textsuperscript{102} (1992) 176 CLR 1.
\textsuperscript{103} Ibid, 55.
\textsuperscript{104} Ibid, 57.
\textsuperscript{105} (2004) 219 CLR 562.
\textsuperscript{106} See the analysis of the judgment in Peter Prince, ‘The High Court and indefinite detention: towards a national bill of rights?’ \textit{Parliamentary Library: Research Brief no. 1} 2004-2005 (16 November 2004):
\textsuperscript{107} \textit{Williams v City of Melbourne} (1933) 49 CLR 142, 155-156 (Dixon J).
\textsuperscript{108} (1989) 166 CLR 161, 165 (Wilson, Dawson, Toohey and Gaudron JJ).
A legislative power conferred by the Constitution must be liberally construed unless there is some other constitutional warrant for a narrower construction ... but in my opinion the same approach cannot be taken in construing a legislative power delegated by a Parliament.109

IV. Proportionality and federation in the European Community, the United States and Canada

Comparative constitutional law is still an emerging and evolving phenomenon in Australian jurisprudence. In its subtler and more contemporary forms it is not necessarily associated with the wholesale transplantation of legal norms from one State to another, which has been approached with caution by various commentators and jurists.110 It does however provide a valuable resource which the Court can draw upon in new, novel areas of constitutional theory and interpretation. For example, Gleece CJ in Roach v Electoral Commission, after reviewing decisions of the European Court of Human Rights and the Canadian Supreme Court with respect to rights to political participation in the Australian Constitution, commented:

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 ... Even so, aspects of the reasoning are instructive.111

Foreign jurisprudence on proportionality in a federal context is instructive to allay the fears of the courts of what such a test could herald. It provides instruction on the basis of proportionality and the nature of the balancing exercise, the possible form a proportionality test may take and may also be of assistance in the determination of the appropriate standard of review (although this is beyond the immediate scope of this paper).

A. European Community

The concepts of subsidiarity and proportionality were enshrined in art 3b of the Treaty of Rome.112 They are currently contained in art 5 of the Treaty,113 which provides:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the

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112 Above n 9.
113 It was also included in I-II of the draft Constitution of the EU which has subsequently been abandoned.
objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Guidelines on subsidiarity and proportionality were formally accepted by the European Union in December 1992 at the Edinburgh European Council. The Council agreed to an overall approach on the application of the subsidiarity principle of what was then the new art 3b of the Treaty. Relevantly, the Guidelines set down the following substantive principles:

- any burdens (either financial or administrative) on the community, national governments, local authorities, economic operators and citizens 'should be minimised and proportionate to the objective to be achieved';
- the form of action should be 'as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community should legislate only to the extent necessary.'

The Guidelines note that the proportionality limb applies 'whether or not the action is within the Community’s exclusive competence.' They go on to indicate that the principle of proportionality is the embodiment of a doctrine already established by the European Court of Justice, although as a general principle of law, proportionality had been developed by the European Court in a similar manner as seen used in Germany, that is, to protect individual rights. Article 5 however requires proportionality of Community actions to any burden placed on member States as well as individuals.

The European Court of Justice treats the principle as justiciable and enforceable against the Community. The Court requires the ‘measures imposed by the Community institutions to be appropriate to achieve the intended objective and not to exceed the limits of what is necessary to

114 The necessary processes behind the implementation of subsidiarity and proportionality in the EU are contained in Protocol 30 of the Treaty.
that end'. The Court has also looked at whether the means were 'manifestly disproportionate' to the advantages obtained by the Community. In making a determination, the Court will consider such matters as whether there were less coercive means available, international efforts with similar purposes and the financial consequences for member States.

To avoid having to decide complex social or economical issues, the Court has given a large margin of discretion to the Community and Council in determining appropriateness of measures. In United Kingdom v Council of the European Union, the Court said:

As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.

The Treaty of Rome articulates a particular conception of the 'federal balance' (although this statement somewhat misconceives the actual nature of the EU, which is not a true 'federation'). The principle of 'subsidiarity' means that the Community is a weaker player, only given competence where the lower members cannot sufficiently act. The concept of 'proportionality', embodied in the words 'any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty', must be considered against this unique background; a background not shared by the Australian federation. It is this difference that Dawson J was at pains to distinguish in Leask.

Another substantial area of distinction between the 'federation' established by the Treaty of Rome and the Australian Constitution is the

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124 Ibid, [20].


nature of the powers conferred on the central entity. Article 3 of the Treaty states that the activities of the Community shall include, for example, a common commercial policy, an internal market with free movement of goods, persons, services and capital and common policies in the spheres of agriculture and fisheries and transport. This brief list demonstrates that many of these areas of competence are ‘purposive’, that is, the Community is given competence to achieve a stated goal. In this respect, the enunciation of powers differs from that in Australia, where only two heads of power have been described consistently by the High Court as ‘purposive’. Whether proportionality must be limited to purposive powers or can be used more broadly is considered in Part V C, below.

B. United States

The Congress’ powers in the United States were constrained by the famous words of Marshall CJ in *McCulloch*:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But 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. 128

( emphasis added)

It has been said that Marshall CJ was enunciating the concept that every legislature must have the *appropriate* means to carry out its powers. 129 This is echoed in Alexander Hamilton’s *Federalist* 23, when discussing the necessary breadth of the federal government’s power for the purpose of defence of the nation:

> This is one of those truths, which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms, as simple as they are universal – the *means* ought to be proportioned to the *end*; the persons from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained. 130

Following the decision in *McCulloch*, the courts have held that the incidental powers of Congress are limited to legislation whose means are limited to legislation whose means are

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127 The defence (s 51(vi)) and treaty implementation aspect of the external affairs (s 51(xxiv)) powers.

128 17 US (4 Wheat) 316 (1819).


not arbitrary or unreasonable beyond the necessities of the circumstances. In the federal context, legislation which is not reasonably adapted to the effective exercise of a legitimate governmental objective within the federal government’s power but can be demonstrated to be for the achievement of an objective within the power reserved to the States is unconstitutional. In Bailey v Drexel Furniture Co (Child Labour Tax Case), the Court said that the provisions of a taxing Act must be ‘naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power’. However, the strength of the proportionality restraint of Marshall CJ attaching to the ‘necessary and proper’ clause has waned in recent years. Particularly, the clause has been interpreted broadly to support federal legislation in conjunction with the commerce clause. In Wickard v Filburn, the Court held:

Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.

(emphasis added)

The combination of the commerce and the ‘necessary and proper’ clause led to an increase in federal legislative dominance in areas previously considered within the exclusive competence of the States. The ‘affects’ doctrine was largely responsible for this increase, although the Court still required that there be a ‘rational basis for a congressional finding that the regulated activity affects interstate commerce’. Further, the Court will still theoretically strike down legislation if ‘there is no reasonable connection between the means selected and the asserted ends.’

Commentators note that the Supreme Court underwent somewhat of a “federalism “revival” or “revolution” in the late 1990s and early 21st century. Indeed, the Court embraced notions of federalism to strike down a comparatively large number of statutes, seemingly narrowing the

131 259 US 20 (1922), 44.
132 317 US 111 (1942), which was relied on heavily in Gonzales v Raich 545 US 1 (2005).
133 Explained in Fry v United States 421 US 542 (1975), 547.
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breadth of the commerce clause particularly. In *United States v Lopez* the Court struck down legislation, *inter alia*, on the basis that it went beyond the federal Congressional powers and entered into local and State areas of competence:

Under the theories that the Government presents ... it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

More recently however, the Court has again turned away from federal considerations. In *Gonzales v Raich*, the Court interpreted the precedent of *Lopez* narrowly. The Court indicated it would defer to Congress provided there was a rational basis to believe that the intrastate matter could affect the interstate market. The observed tendency away from centralism therefore seems to be pushing back again towards a broad and deferential approach to both the commerce and the ‘necessary and proper’ clauses.

The United States has also taken an interesting course into proportionality and characterisation under amend XIV § 5 of the *United States Constitution*, which is generally referred to as the federal government’s ‘enforcement’ power. Amendment XIV obliges the States to respect various rights of the individual. The federal government is then empowered to enforce this clause against the States if they act in contravention of their obligations.

The Supreme Court has adopted a ‘congruence’ and ‘proportionality’ test for federal laws enacted under this provision. The landmark decision was *Boerne*. In that case, the Archbishop of San Antonio challenged the local zoning authorities over a denial of a building permit to enlarge a church on the basis that it infringed the *Religious Freedom Restoration Act 1993* (US) (‘RFRA’). The Supreme Court based its decision on two main judicial principles. The Court held that there must be a

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140 Ibid, particularly at [23]-[25].

congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented ... strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.142

The Court also considered that the RFRA infringed the principles of separation of powers by substituting Congress’ interpretation of the Constitution for that of the Court in a previous decision of Employment Division, Department of Human Resources of Ore v Smith.143

The Supreme Court heard arguments that the legislation allowed Congress to intrude into ‘traditional areas of state responsibility, a power inconsistent with the federal design of the Constitution.’144 The Court accepted this argument, stating that the cost the RFRA exacted on the States through imposing a heavy litigation burden and ‘in terms of curtailing their traditional general regulatory power’ far exceeded any pattern of unconstitutional conduct that the RFRA was intended to remedy.145 The clearest explanation for the Supreme Court’s approach is that it was an effective way of ensuring that an otherwise uncontainable federal power did not obliterate the State government’s ability to function as independent sources of power.146 It is a novel manner of using proportionality, looking at the States as having ‘rights’ to certain legislative areas not dissimilar to those of individuals in the traditional proportionality tests of Germany, Europe and Canada.147

C. Canada

Canada’s federal design is quite different from the Australian and United States version. For example, Australia’s federal legislative powers are enumerated, with plenary, residue power left to the States; in Canada, both the central and provinces are given enumerated heads of legislative power and the residue is left to the central government.148 This has meant that Canada has taken a narrower approach to interpreting the

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144 Ibid, 11 (Kennedy J for the Court).

145 Boerne 521 US 507 (1997), (Kennedy J for the Court).


147 Vicki C Jackson, above n 146, 626; Elisabeth Zoller, above n 31, 584.

148 Sections 91 and 92 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11.
enumerated heads of power to ensure that the two lists remain mutually exclusive.\textsuperscript{149}

Further, unlike in Australia, the list of powers does not include an ‘ancillary’ power. Hogg notes that there have been judicial suggestions that such a power should be implied, but argues that this is unnecessary because of the manner in which heads of power are interpreted. Whilst heads of power are mutually exclusive, they do support legislation, the ‘pith and substance’\textsuperscript{150} of which falls within the head of power, that touches on incidental and ancillary matters.\textsuperscript{151} It is necessary to note that characterisation according to ‘pith and substance’ has been rejected in Australia, where dual (or multiple) characterisation of laws is preferred.\textsuperscript{152}

With these differences in mind, the Canadian courts have limited the reach of the scope of powers, and the ability of legislation to touch upon incidental or ancillary matters. To do this, the courts developed the ‘rational connection’ doctrine which contains many similar elements to proportionality. This principle was best enunciated by Laskin JA in \textit{Papp v Papp}. His Honour said:

Where there is admitted competence, as there is here, to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged.\textsuperscript{153}

The benefits of the ‘rational connection’ test are said to be the flexibility it allows legislatures to encroach upon the legislative competence of the other level without allowing for ‘unjustified usurpation of powers’.\textsuperscript{154}

\textsuperscript{150} Which is the requirement for characterisation in Canada: \textit{Union Colliery Co v Bryden} [1899] AC 580, 587 (Lord Watson).
\textsuperscript{151} See, eg, \textit{Attorney-General (Canada) v Nykorak} [1962] SCR 331, 335 (Judson J for the majority), \textit{Papp v Papp} [1970] 1 OR 331 (Ont. CA) (Laskin JA); \textit{Attorney-General (Canada) v Canadian National Transportation Ltd} [1983] 3 SCR 206, 228 (Laskin CJ).
\textsuperscript{153} \textit{Papp v Papp} [1970] 1 OR 331 (Ont. CA), 335-336 (Laskin JA). This test has been applied in the Supreme Court. See, eg, \textit{R v Zelensky} [1978] 2 SCR 940, 955; \textit{Multiple Access v McCutcheon} [1982] 2 SCR 161, 183.
\textsuperscript{154} Peter W Hogg, above n 149, 398. Beatty also theorises that the federal constitutional jurisprudence of the Supreme Court can be explained by a general principle of proportionality: David M Beatty \textit{Constitutional Law in Theory and Practice} (1995), 15-17 and Chapter 2.
V. Proportionality and federation – Can it work in Australia?

The discussion of the European, United States and Canadian experience above demonstrates that proportionality is not only invoked by courts in human rights jurisprudence. This next section will examine whether proportionality is a viable mechanism to protect the Australian federal structure, specifically addressing some of the arguments against its use.

A. Constitutional text and structure

Unlike, for example, the Treaty of Rome, the Australian Constitution contains no express restraint on the legislative power of the Commonwealth (or the States) to enact laws grossly disproportionate to the purpose for which they were created. As outlined above, the proposed use of proportionality is linked to an implied constitutional right of the citizen. Where does this implied right come from? Justice McHugh’s approach, which has found favour with the Court, has been explicit that

it is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure … It is the text and the implications to be drawn from the text and structure that contain the meaning of the Constitution.

It is suggested that the right of an individual to be governed by an appropriate entity is to be implied in the text and structure of the Australian Constitution. The intention of the framers that the Commonwealth be set up as an ‘indissoluble federal’ entity is clear throughout the text. Lumb asserts that ‘Federal division of power is the major feature of the Australian constitutional system.’ The State Parliaments, their Constitutions and their laws are ‘saved’ under ss 106-108. The legislative powers of the Commonwealth, whilst given supremacy by s 109, are limited and ‘subject to the Constitution’ in ss 51

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155 Some commentators have considered whether proportionality could be required by the words in the initial paragraph of s 51 of the Australian Constitution: the Commonwealth’s legislative power is granted for the ‘peace, order and good government’ with respect to each of the subject matters: Brian F Fitzgerald, above n 35, 301; Jeremy Kirk above n 11, 34. The attraction of nailing the implication to specific words in the Constitution is obvious. However, the High Court has previously held that this phrase contains words of empowerment and not limitation based on notions of the public interest (and, presumably, federal balance): Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, 10.

156 The principle was affirmed by the Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 566-567.


158 Preamble to the Australian Constitution.

159 R D Lumb, Australian Constitutionalism (1983), 112.
and 52. The legislative structure of the Commonwealth Parliament (particularly the Senate) is predicated on federation.

The constitutional fact of federation has even provided the basis for a restriction on the Commonwealth’s power to enact laws binding on the States (and vice versa) post-Engineers. Justice Dixon has been acknowledged as the driving force behind the implication, for example, commenting in *Melbourne Corporation v Commonwealth*, his Honour said:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized.

It is clear therefore that the Court treats federalism as more than a political principle or theory extraneous to the text or structure of the *Australian Constitution*. The text and structure demonstrate that the polity created thereby is to be federal. What is a federal polity? Sawer concedes that federalism is not a precise set of principles. Nonetheless, he does attempt definition. At its simplest, Sawer asserts that a federal polity has three essential features: a geographical area in which there a several governments (one central government with jurisdiction over the entire area and others with limited jurisdiction), each government must possess a reasonable degree of autonomy and there must be a restriction on the ability of each government to unilaterally destroy the others. At a higher level of complexity, it encompasses autonomy of instrumentalities, substantive, separate areas of competence and limits on coercion between governments. Dicey describes federalism as a system of government under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate States.

The advantages of a federal system for individual citizens have been canvassed at greater length above. It is suggested that an implied right to be governed by the appropriate entity is necessary to give effect to the provisions of the *Australian Constitution* which establish the federation. Disproportionate exercise of legislative power by a central government of enumerated powers can see each of the advantages of federalism undermined to the detriment of the citizens. The decentralisation of power which creates the check and balance can be undermined if the

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160 Leslie Zines, above n 5, 319.
162 (1947) 74 CLR 31, 83 (Dixon J).
lower level of units in a federation is devoid of power. The provision of services and development of policies at an appropriate level which allows for a localised, accurate and more participatory democracy and diversification of policies across different geographical and cultural borders within the federation will be removed if lower units have no autonomous competency but act merely as service providers of the central government.

Theoretically, disproportionate exercise of State legislative power could also undermine these advantages. However, in the context of constitutionally enumerated (and therefore protected) Commonwealth powers and the inconsistency clause in s109 of the Australian Constitution which gives legislative supremacy to the Commonwealth, this type of abuse of State power is unlikely.166

B. Separation of powers
Judicial reluctance to embrace proportionality has traditionally rested on an argument that the court should not tread into the area of balancing policy issues and passing judgment on the desirability of particular measures to achieve governmental objectives.167 This type of task is properly the role of the Parliament, accountable to the people. The argument continues that this type of judicial review is antithetical to the concept of separation of powers and may undermine public confidence in the independence, impartiality and integrity of the judiciary. Using this reasoning, Dawson J in Cunliffe warned of the use of proportionality by judges:

There is even greater danger in the inappropriate use of the concept of reasonable proportionality to test the validity of legislation in the absence of constitutionally guaranteed freedoms. It invites the court to have 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.168

This argument cannot consistently sit with the High Court's current endorsement of the proportionality principle in determining

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Proportionality in rights infringement cases, for legislation characterised by their purpose and for delegated legislation under statute. If the Court undertakes such a role in these circumstances, why not generally?

The courts of Europe, Canada and the United States (and elsewhere) have engaged in these processes. Although each of these courts employs the test in different jurisdictions and contexts, the underlying theme of balancing competing interests as part of the judicial methodology is the same. Whilst no superior court is ever clear of controversy and criticism, each of these institutions still commands the respect of the legislature, the executive and the citizens.

A similar criticism which is made of proportionality is that it is indefinable. In this respect, it gives the court a discretion that is inappropriate for judicial exercise. For example, Stone is critical of the inconsistency and error that she asserts is latent in ad hoc balancing often associated with the use of proportionality in Canada and Europe.\(^{169}\)

However, as Stone’s analysis suggests, proportionality does not need to be associated with unreined judicial discretion or balancing. The nature of the common law method is such that the more such a test is applied, the more guidance will be available in its application. Gradually, judicial reasoning will develop categories in which different levels of scrutiny need to be applied in the balancing process. Proportionality is not indefinable, but as a new principle of law it lacks the base of jurisprudence which gives it definition. Precedent will develop over time to reduce the level of judicial discretion and provide guidance to citizens and their advisors as to the likely outcome in a particular case. It is suggested here that criticisms that proportionality cannot be consistent with rule of law principles are premature and therefore flawed.\(^{170}\)

The use of a proportionality test makes value judgments in court decisions transparent.\(^{171}\) There has been an increasing recognition that judges do ‘make law’\(^{172}\) and rely on value judgments, both in human

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\(^{169}\) See further discussion of Stone in Part III A, above.

\(^{170}\) Whether this can be achieved whilst the High Court maintains its emphasis on implications deriving from the constitutional text and structure and not broader principles as Stone suggests is a separate issue, and beyond the scope of the current analysis.


\(^{172}\) This was famously asserted by Lord Radcliffe in ‘Law and Order’ (1964) 61 Law Society’s Gazette 821. It is now widely accepted, see for example Anthony Mason, ‘Rights, Values and Legal Institutions: Reshaping Australian Institutions’ (1997)
rights and federal jurisprudence. If policy and value are an inevitable part of the judicial task, it is better that the balancing considerations are articulated publicly. A proportionality test in characterisation of federal laws will facilitate this.

It may be suggested that proportionality cuts both ways, in that it may also be used a tool by centrist judges to further exacerbate the lean toward the centre. Certainly it is recognised that a proportionality test, eg in free speech jurisprudence particularly in Canada, has not necessarily guaranteed adequate protection of individual rights. There are two strong points to be made against this argument in relation to the protection of rights associated with federalism. First, proportionality requires that the leanings of centrist judges are public. If the centre is favoured, this must be made explicit and justified. Second, it is unlikely to result in any further leaning to the centre than is achieved without proportionality. Proportionality will require that the Court considers the affect of Commonwealth legislative action on the federation. This is one more consideration than is currently required.

The level of deference that ought to be afforded to the legislature is a related question. The greater the level of deference, the less likely a court will be accused of usurping the role of the legislature. However, the more deference, the less effective tool proportionality will be in curtailing Commonwealth power in support of the federation. The European Court of Justice has intentionally adopted a deferential approach in matters which are socially complex and polycentric. Many commentators that have been willing to offer support for proportionality in characterisation for the general protection of federal-type interests have done so in a guarded manner by advocating a wide degree of deference to be paid to the legislature.

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Which has previously been the case: Ibid, 18. Articulation of legal tests clarifies the law and makes it more publicly accessible, supporting some of the most basic tenets of the rule of law: Vicki C Jackson, above n 146, 611; Suri Ratnapala, Australian Constitutional Law: Foundations and Theory (2nd ed, 2007), 234.

The leaning of the current High Court to the centre has been identified. See, eg, James Allan and Nicholas Aroney, above n 16, 294.

Adrienne Stone, above n 36, 697.

Jeremy Kirk, above n 11, 36-37, 41-42; Brian F Fitzgerald, above n 35. In the United States, for a similar view, see Vicki C Jackson, above n 146, 627-629, 632.
Proportionality and Federalism: Can Australia learn from the European Community, the US and Canada?

To govern efficiently and effectively, and fulfil their elected mandate, the government must be given a wide discretion as to how it chooses to do so. Proportionality can be a useful tool, but in certain instances it can and should be applied deferentially. The courts must articulate the appropriate level of deference in any proportionality-type test to set clear boundaries as to what the constitutionally prescribed limits are. This probably must involve, as Stone suggests, the development of different categories of legislation which require different levels of deference.

C. Expansion of proportionality beyond purposive powers

The current use of proportionality in characterisation of ‘purposive’ powers is ad hoc and unsatisfactory. The term ‘purposive powers’ is problematic and, beyond the defence power, has caused judicial division and legal uncertainty.\(^{178}\) Chief Justice Mason has indicated that perhaps the conciliation and arbitration power\(^{179}\) is more of a purposive power than other powers.\(^{180}\) Justice Gaudron has indicated a willingness to use proportionality with respect to the aliens power, but has not gone so far as to refer to it as a purposive power. The use of proportionality in applying the incidental power is far from settled among the High Court.

Justice Kirby has been critical of the distinctions drawn by the majority between purposive and non-purposive powers:

Such distinctions find no reflection in the concept of proportionality in the legal systems from which that concept was originally derived. They were not mentioned in the authorities by which the concept originally found its way into the jurisprudence of this Court. They are difficult to reconcile with the essential idea of proportionality. They are not universally accepted by the opinions expressed within the Court. It is 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. The same basic question is in issue in every case: namely where the boundary of federal constitutional power lies.\(^{181}\)

The development of proportionality in the treaty implementation aspect of the external affairs power demonstrates Kirby J’s comments well. The reasoning behind the development of the proportionality test in those circumstances seems equally applicable to other heads of power. Many of the judges in the Tasmanian Dams Case and Richardson indicated that the external affairs power must be confined in some form to ensure that it

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179 Section 51(xxxv).

180 Nationwide News (1992) 177 CLR 1, 27 (Mason CJ).

was not given ‘limitless’ operation.\textsuperscript{182} Why this should apply only to ‘purposive’ powers and not, for example, to the corporations power given the enormously expanded role of corporations in contemporary society, has not been sufficiently explained. In dissent in \textit{Work Choices}, Kirby J argued that the interpretation given to the corporations power by the majority would ‘have profound consequences for the residual legislative and governmental powers of the States’ due to:

the enormous expansion in Australia in the number, variety and activities of the foreign and trading corporations described in s 51(\textit{xx}), including in the outsourcing and privatisation in Australia today in the delivery of many governmental or formerly governmental services.\textsuperscript{183}

\textbf{VI. Conclusion}

The adoption of a general test of proportionality would require a significant, almost revolutionary, shift in jurisprudence for the High Court. The momentum against this shift is strong. From all indications, the Court is moving away from a general use of proportionality, not towards it. Nonetheless, this paper argues for a broader adoption of proportionality through an implied right – a test which would require proportionality to governmental objectives to safeguard the citizens’ right to be governed by both Commonwealth and State units in a constitutional federation. This argument is based upon a premise that there are meaningful advantages to maintaining a federation for the citizens of Australia.

The trite argument of many judges that proportionality would take them beyond their proper function and into the realm of the legislature has lost its value. Proportionality has been a cornerstone of European and Canadian human rights jurisprudence and is increasingly accepted in Australia as part of ours. Further, the European, Canadian and United States discourse demonstrates that proportionality can be used as an additional tool in determining constitutionality of legislation and ensure that the basic structures and advantages of a federal system are maintained.

Proportionality in characterisation beyond its current, limited use with respect to the purposive powers and the incidental power throws up many

\textsuperscript{182} See, eg, \textit{Tasmanian Dams Case} (1983) 158 CLR 1, 99-100 (Gibbs CJ), 197 (Wilson J); \textit{Koowarta v Bjelke-Peterson} (1982) 153 CLR 169, 198 (Gibbs CJ), 252 (Wilson J); \textit{Richardson} (1988) 164 CLR 261, 317 (Deane J), 202-204 (Wilson J).

challenges. These include the form of the test, that is, what ‘rights’ it would be employed to protect and the content of such rights. None of these issues are insurmountable. Conversely, a broader use of proportionality would remove the arbitrary application of it in some instances which has caused substantial disagreement amongst the High Court. It would assist in the maintenance of Australia’s federal structure which, after recent decisions of the Court has taken a considerable tilt towards the centre. One of the attractions of proportionality is its flexibility in application, allowing power balances between central and regional governments to naturally shift whilst maintaining the overall structure. \(^{184}\) Proportionality would open up the reasoning of the courts, requiring a transparent test to be developed and removing the veil of legalism.

\(^{184}\) Sawer notes that the shift in federal balance occurs from decade to decade and even from day to day: Geoffrey Sawer, above n 163, 2.