

# REASONABLY APPROPRIATE AND ADAPTED? ASSESSING PROPORTIONALITY AND THE ‘SPECTRUM’ OF SCRUTINY IN *MCCLOY v NEW SOUTH WALES*

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In *Lange v Australian Broadcasting Corporation* (*Lange*), the High Court unanimously adopted a standard of judicial review that has since been used to determine the validity of laws found to burden the implied freedom of political communication.<sup>1</sup> This standard has long been regarded as unsatisfactorily vague. It was memorably described by Kirby J as a ‘ritual incantation, devoid of clear meaning’,<sup>2</sup> and more recently by Heydon J as ‘mysterious’.<sup>3</sup> Over a decade ago, H P Lee predicted that a more precise judicial definition of the *Lange* test was unlikely.<sup>4</sup> This all changed in *McCloy v New South Wales* (*McCloy*), in which the plurality judgment of French CJ, Kiefel, Bell and Keane JJ (‘the plurality’) recast the *Lange* test as a highly structured proportionality enquiry.<sup>5</sup> This was not an innovation with which their colleagues agreed.<sup>6</sup> Indeed, Gageler J proposed an entirely different test based on a spectrum of scrutiny that he previously articulated in *Tajjour v New South Wales* (*Tajjour*).<sup>7</sup>

This article proceeds in five parts. Part I outlines the background to *McCloy* and identifies the components of the different standards. Part II explains the divergence between the two approaches by suggesting that each is informed by a different vision of the broader function of judicial review in a representative democracy. Parts III and IV engage in a comparative analysis of the two approaches in order to determine which is preferable. Drawing on the experience of apex courts in other jurisdictions, it argues that Gageler J’s approach may require courts to resolve issues which extend beyond their institutional competence. It suggests that the plurality’s approach is better adapted to the limitations of the judicial function. Part V offers some concluding remarks.

## I THE STANDARDS ADOPTED

### A Background

In *McCloy*, the High Court was required to assess the constitutional validity of various provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (‘EFED Act’). These provisions imposed a general cap on political donations to State election campaigns, and prohibited the making of indirect contributions to

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<sup>1</sup> (1997) 189 CLR 520, 567-568 (The Court).

<sup>2</sup> *Coleman v Power* (2004) 220 CLR 1, 90 (Kirby J) (*Coleman*).

<sup>3</sup> *Monis v The Queen* (2013) 249 CLR 92, 182 (Heydon J) (*Monis*).

<sup>4</sup> H P Lee, ‘The “Reasonably Appropriate and Adapted” Test and the Implied Freedom of Political Communication’ in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 59, 81.

<sup>5</sup> (2015) 325 ALR 15, 18-19 (*McCloy*).

<sup>6</sup> *Ibid* 49 (Gageler J), 76 (Nettle J), 86 (Gordon J).

<sup>7</sup> (2014) 88 ALJR 860 (*Tajjour*).

State and local government election campaigns.<sup>8</sup> Most controversially, Division 4A of Part 6 prohibited the making, acceptance or solicitation of a political donation from a ‘prohibited donor’.<sup>9</sup> The term ‘prohibited donor’ was defined to include corporations engaged in property development and any of their close associates.<sup>10</sup> The three plaintiffs argued that the provisions were invalid on the basis that they impermissibly infringed the implied freedom of political communication. The plurality, and Gageler and Gordon JJ in their separate judgments, disagreed.<sup>11</sup> Nettle J dissented in part, holding that Division 4A was invalid in its application to property developers.<sup>12</sup>

In *Lange*, the High Court held that such provisions will only be invalid if they suffer from two infirmities. First, the provisions must burden the implied freedom either in its terms, operation or effect.<sup>13</sup> Secondly, the provisions must not be ‘reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.<sup>14</sup> The diverging approaches adopted by the plurality and Gageler J in *McCloy* are intended to elucidate this test, not to replace it. They provide methodologies that can be used to determine whether the second limb is satisfied.<sup>15</sup> In so doing, they help to expose the reasoning processes and value judgments which underpin the second limb of the *Lange* test.<sup>16</sup>

### B The Plurality

The plurality’s test contains a number of distinct components. After determining whether the law effectively burdens the implied freedom,<sup>17</sup> the court is to engage in ‘compatibility testing’ to assess whether the purpose of the law and the means adopted to achieve it are ‘legitimate’.<sup>18</sup> This will be the case if the law is compatible with the maintenance of the constitutionally prescribed system of representative government, in the sense that the law is not directed to, or does not operate so as to, impinge upon or impede that system’s ability to function.<sup>19</sup>

If the law satisfies this ‘compatibility’ test, the court is to engage in three sequential enquiries described as ‘proportionality testing’.<sup>20</sup> The first test, known as ‘suitability’, requires the court to determine whether the impugned law has a rational connection to the legitimate purpose.<sup>21</sup> This will be the case if the law can reasonably be seen to further the purpose or contribute to its realisation in some way.<sup>22</sup> The second test, known as ‘necessity’, requires the court to determine whether there are any ‘obvious’ and ‘compelling’ alternative measures which are reasonably practicable for,

<sup>8</sup> *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ss 95A(1), 96E(1). See *McCloy* (2015) 325 ALR 15, 53-54 (Gageler J).

<sup>9</sup> *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 96GA(1).

<sup>10</sup> *Ibid* ss 96GAA, 96GB(1).

<sup>11</sup> *McCloy* (2015) 325 ALR 15, 39 (French CJ, Kiefel, Bell and Keane JJ), 62 (Gageler J), 98-99 (Gordon J).

<sup>12</sup> *Ibid* 79 (Nettle J).

<sup>13</sup> (1997) 189 CLR 520, 567.

<sup>14</sup> *Ibid*.

<sup>15</sup> See, eg, *McCloy* (2015) 325 ALR 15, 19 (French CJ, Kiefel, Bell and Keane JJ).

<sup>16</sup> See, eg, *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1044 (Kiefel J) (*‘Murphy’*).

<sup>17</sup> *McCloy* (2015) 325 ALR 15, 18.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid* 18, 32-33.

<sup>20</sup> *Ibid* 19.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid* 30; see *Unions New South Wales v New South Wales* (2013) 252 CLR 530, 557 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (*‘Unions NSW’*).

and equally effective at, achieving the legitimate purpose, but which impose a less onerous restriction on the implied freedom.<sup>23</sup> An impugned law will be ‘necessary’ if no such measures are identified. Recently, the High Court has stressed that alternative measures which may be materially more expensive than those adopted in the impugned law should not be used in this analysis.<sup>24</sup> The third test, known as ‘balancing’, requires the court to determine whether the importance of the legitimate purpose and the benefits of its achievement outweighs the detriment caused by the restriction of the freedom.<sup>25</sup> If the compatibility test is passed, and the impugned law is suitable, necessary and adequate in balance, it will be valid notwithstanding its burden on the implied freedom.

The plurality’s decision marks the culmination of the progressive development of a more structured proportionality test in judgments to which Crennan, Kiefel and Bell JJ have variously been party in recent years.<sup>26</sup> This process has been influenced by proportionality tests that have been developed in jurisdictions such as Germany,<sup>27</sup> the United Kingdom,<sup>28</sup> Canada,<sup>29</sup> Israel,<sup>30</sup> New Zealand<sup>31</sup> and the European Union.<sup>32</sup> That said, the test does derive support from earlier Australian decisions. In *Australian Capital Television Pty Ltd v Commonwealth* (‘ACTV’), for example, Mason CJ proposed the adoption of a proportionality test that involved both a ‘balancing’ and a ‘reasonable necessity’ component in order to determine the validity of laws which restricted an ‘activity or mode of communication’ rather than its content.<sup>33</sup> McHugh J appeared to adopt a similar test,<sup>34</sup> as did Brennan J in dissent.<sup>35</sup> These concepts of reasonable necessity and balancing were invoked in subsequent cases such as *Theophanous v Herald & Weekly Times Ltd*<sup>36</sup> and *Cunliffe v Commonwealth* (‘Cunliffe’).<sup>37</sup>

### C Gageler J

Gageler J raised two objections to the generality and uniformity of the plurality’s approach. First, his Honour questioned whether it was appropriate to apply each of the three components of the proportionality test in all cases, irrespective of the nature and

<sup>23</sup> *McCloy* (2015) 325 ALR 15, 19, 36. See also *Monis* (2013) 249 CLR 92, 214 (Crennan, Kiefel and Bell JJ); *Tajjour* (2014) 88 ALJR 860, 888-889 (Crennan, Kiefel and Bell JJ).

<sup>24</sup> *Murphy* (2016) 90 ALJR 1027, 1044 (Kiefel J), 1060 (Keane J), 1072 (Nettle J).

<sup>25</sup> *McCloy* (2015) 325 ALR 15, 19, 37 (French CJ, Kiefel, Bell and Keane JJ).

<sup>26</sup> *Monis* (2013) 249 CLR 92, 193-194 (Crennan, Kiefel and Bell JJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 84-87 (Crennan and Kiefel JJ); *Tajjour* (2014) 88 ALJR 860, 888-891 (Crennan, Kiefel and Bell JJ).

<sup>27</sup> Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 10-11, 26-28. See, eg, *Cannabis Case* (1990) 90 BVerfGE 145, 172-173, 183-185.

<sup>28</sup> See, eg, *Bank Mellat v Her Majesty’s Treasury (No 2)* [2014] 2 AC 700, 771 (Lord Sumption JSC), 790-791 (Lord Reed JSC) (‘*Bank Mellat*’).

<sup>29</sup> See, eg, *R v Oakes* [1986] 1 SCR 103, 138-139 (Dickson CJ) (‘*Oakes*’).

<sup>30</sup> See, eg, *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] IsrLR 1, [95] (Barak P).

<sup>31</sup> See, eg, *R v Hansen* [2007] NZSC 7, [103]-[104] (Tipping J).

<sup>32</sup> See Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (Oxford University Press, 5th ed, 2011) 526.

<sup>33</sup> (1992) 177 CLR 106, 143-144 (‘ACTV’).

<sup>34</sup> *Ibid* 235.

<sup>35</sup> *Ibid* 150, 157.

<sup>36</sup> (1994) 182 CLR 104, 133, 138 (Mason CJ, Toohey and Gaudron JJ) (‘*Theophanous*’).

<sup>37</sup> (1994) 182 CLR 272, 300-304 (Mason CJ) (‘*Cunliffe*’).

degree of the burden imposed by the impugned law on the implied freedom.<sup>38</sup> Secondly, his Honour queried whether the general terms of the plurality's balancing test sufficiently focuses the enquiry on the role of the implied freedom in protecting the operation of the constitutionally prescribed system of representative and responsible government.<sup>39</sup>

Accordingly, Gageler J adopted a different test. It proceeded in three stages. First, the court is to identify an 'effective' or meaningful burden on the implied freedom.<sup>40</sup> Secondly, the court is to determine whether the purpose of the law is 'legitimate,' in the sense that it is consistent with the constitutionally prescribed system of representative and responsible government.<sup>41</sup> Gageler J utilised the 'suitability' concept at this stage of the analysis as an objective test for determining the purpose of the impugned law.<sup>42</sup>

The third stage of the test determines whether the law pursues the legitimate purpose in a manner that is 'consistent with the preservation of the integrity of the system of representative and responsible government'.<sup>43</sup> The standard of review to be applied at this stage of the test will depend upon the nature and intensity of the burden that the impugned law imposes upon the implied freedom.<sup>44</sup> Gageler J's judgment in *Tajjour* suggests that this creates a 'spectrum' of scrutiny pursuant to which the standard of review adopted will become more exacting as the degree of risk posed by the impugned law to the system of representative and responsible government increases.<sup>45</sup> Laws which do not create a high degree of systemic risk need only be 'rationally related' to the pursuit of a legitimate end.<sup>46</sup> Laws which impose content based restrictions on political communication, which regulate 'inherently political communication', which undermine the ability of a voter to make an 'informed electoral choice', or which operate in the context of elections for political office will be subject to more exacting scrutiny.<sup>47</sup>

As the EFED Act imposed restrictions on political communication that operated in the context of State and local government elections, Gageler J adopted an exacting two-step test situated at the upper end of the spectrum.<sup>48</sup> First, the purpose of the law was required to be 'compelling' when viewed in light of the system of representative and responsible government.<sup>49</sup> This criterion is synonymous with a requirement that the purpose of the law be 'pressing and substantial'.<sup>50</sup> Secondly, the imposition of the burden was required on 'close scrutiny' to be judged reasonably necessary for achieving the compelling purpose.<sup>51</sup> This component of the test involved a consideration of the extent to which the means adopted were tailored to the ends pursued by the law,<sup>52</sup> with emphasis on its alleged overbreadth.<sup>53</sup> It also required an

<sup>38</sup> *McCloy* (2015) 325 ALR 15, 49, 52.

<sup>39</sup> *Ibid* 51.

<sup>40</sup> *Ibid* 46.

<sup>41</sup> *Ibid* 47.

<sup>42</sup> *Ibid* 47-48. See, eg, Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 24.

<sup>43</sup> *McCloy* (2015) 325 ALR 15, 47.

<sup>44</sup> *Ibid* 52.

<sup>45</sup> *Tajjour* (2014) 88 ALJR 860, 894.

<sup>46</sup> *Ibid*.

<sup>47</sup> *McCloy* (2015) 325 ALR 15, 52.

<sup>48</sup> *Ibid* 53-54.

<sup>49</sup> *Ibid* 39-40, 53, 60.

<sup>50</sup> *Tajjour* (2014) 88 ALJR 860, 894.

<sup>51</sup> *McCloy* (2015) 325 ALR 15, 53.

<sup>52</sup> *Ibid* 61-62.

analysis of the feasibility of less restrictive alternative approaches to pursuing the compelling end.<sup>54</sup>

The proposition that a different standard of review should be applied depending on the nature and extent of the burden imposed by the impugned law was rejected by a majority of the High Court in *Tajjour*.<sup>55</sup> However, it is a concept that previously enjoyed widespread judicial support.<sup>56</sup> In *ACTV*, for example, Mason CJ suggested that a more ‘scrupulous’ standard of review should be applied when the impugned law regulates the content of political communications.<sup>57</sup> This standard, which required that the law be supported by a ‘compelling justification’ and be no more restrictive of political communication than is ‘reasonably necessary’ to protect a competing public interest,<sup>58</sup> is similar to that proposed by Gageler J in *McCloy*, as are those employed by Gaudron J in *Levy v Victoria*,<sup>59</sup> and Gleeson CJ in *Mullholland v Australian Electoral Commission*.<sup>60</sup> This line of authority draws heavily on the American ‘strict scrutiny’ test,<sup>61</sup> and on the distinction between the standard of review for ‘content based’ and ‘content neutral’ restrictions of First Amendment rights,<sup>62</sup> albeit that the concept of a spectrum of scrutiny diverges from the categorical approach that is currently dominant in the United States.<sup>63</sup>

## II THE STANDARDS IN THEORY

Adrienne Stone has consistently argued that the choice of a standard of review to determine the validity of laws that burden the implied freedom must be influenced by normative considerations drawn from outside the text and structure of the *Constitution*.<sup>64</sup> This line of scholarship is a compelling criticism of the textualist approach announced in *Lange*,<sup>65</sup> and later defended at length by McHugh J in *Coleman*

<sup>53</sup> Ibid 62. See also *Tajjour* (2014) 88 ALJR 860, 896 (Gageler J).

<sup>54</sup> *McCloy* (2015) 325 ALR 15, 60.

<sup>55</sup> *Tajjour* (2014) 88 ALJR 860, 877 (French CJ), 890-891 (Crennan, Kiefel and Bell JJ)

<sup>56</sup> *McCloy* (2015) 325 ALR 15, 74-75 (Nettle J).

<sup>57</sup> (1992) 177 CLR 106, 143-144.

<sup>58</sup> Ibid 143.

<sup>59</sup> (1997) 189 CLR 579, 619.

<sup>60</sup> (2004) 220 CLR 181, 200.

<sup>61</sup> Adrienne Stone, ‘Freedom of Political Communication, the Constitution and the Common Law’ (1998) 26 *Federal Law Review* 219, 230. See, eg, *Perry Education Association v Perry Educators’ Association*, 460 US 37, 45 (White J) (1983); *United States v Playboy Entertainment Group Inc*, 529 US 803, 813 (Kennedy J) (2000).

<sup>62</sup> Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668, 693. Compare *Sable Communications of California v Federal Communication Commission*, 492 US 115, 126 (White J) (1989) with *Turner Broadcasting System Inc v Federal Communications Commission*, 520 US 180, 189 (Kennedy J) (1997).

<sup>63</sup> See, eg, Kathleen M. Sullivan, ‘Foreword: The Justices of Rules and Standards’ (1992) 106 *Harvard Law Review* 22, 59-60; Jamaal Greene, ‘The Rule of Law as a Law of Standards’ (2011) 99 *Georgetown Law Journal* 1289, 1289-190.

<sup>64</sup> Adrienne Stone, above n 62, 698-699; Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28 *University of New South Wales Law Journal* 842, 844-845. See also Dan Meagher, ‘What is ‘Political Communication’? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438, 442.

<sup>65</sup> (1997) 189 CLR 520, 567 (the Court).

*v Power* ('Coleman').<sup>66</sup> The influence of such normative concepts explains the differences between the standards of review adopted by the plurality and Gageler J in *McCloy*. The two standards are each informed by a different vision of the broader function of judicial review in a representative democracy.

#### A *The Plurality: Facilitating a 'Culture of Justification'*

The plurality's proportionality test is informed by a recognition of the importance of judicial review in facilitating a 'culture of justification' in governmental decision-making.<sup>67</sup> As Aharon Barak has argued, proportionality requires the government to provide a 'rational justification' for the limitation of a constitutional right or principle at any point throughout the period in which the impugned law operates.<sup>68</sup> This 'culture of justification' extends to the judiciary as well as the legislature and executive. Proportionality builds upon the traditional common law method of judicial decision-making by requiring courts to provide transparent and structured reasons for their decisions that identify precisely the matters that were taken into account in making the decision, the context in which those matters were taken into account, and the weight that was attributed to each of those matters.<sup>69</sup> This process of 'objective and principled elaboration'<sup>70</sup> constrains judicial discretion,<sup>71</sup> provides guidance to the legislature, and bolsters the public accountability of the judiciary.<sup>72</sup> It can help to promote a systematic and rational evaluation of rights issues in executive and legislative processes.<sup>73</sup>

Judicial review of the proportionality of legislation in a 'culture of justification' has a number of important features. It requires a court to proceed beyond an assessment of the positive legal authority of the legislature to enact a particular law,<sup>74</sup> and often necessitates substantive review of its merits.<sup>75</sup> While the former feature appropriately reflects the nature of the implied freedom as a negative restriction on the scope of a legislative power that provides prima facie support for an impugned law,<sup>76</sup> it may be objected that the latter feature is inconsistent with the separation of powers. The force of this objection is reduced once it is recognised that there is ordinarily a range of permissible courses of legislative action that could reasonably be considered proportionate.<sup>77</sup> In this respect, courts need not consider whether a law is an optimal or

<sup>66</sup> (2004) 220 CLR 1, 46-51.

<sup>67</sup> Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 7, 111, 113.

<sup>68</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 459.

<sup>69</sup> *Bank Mellat* [2014] 2 AC 700, 790 (Lord Reed JSC); *District of Columbia v Heller*, 554 US 570, 719 (Breyer J) (2008).

<sup>70</sup> Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation' in Geoffrey Lindell (ed) *The Mason Papers: Selected Articles & Speeches by Sir Anthony Mason AC, KBE* (Federation Press, 2007) 110, 141.

<sup>71</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140 (Kiefel J) ('Rowe').

<sup>72</sup> Aharon Barak, above n 68, 462-463, 465-467.

<sup>73</sup> Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 118-121; Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (McGill-Queens University Press, 1996) 122.

<sup>74</sup> Moshe Cohen-Eliya and Iddo Porat, above n 27, 7, 112, 118.

<sup>75</sup> Lord Sumption, 'Anxious Scrutiny' (Speech delivered at Administrative Law Bar Association, Inner Temple, 4 November 2014) 9, 14. *Contra R (Begum) v Denbigh High School Governors* [2007] 1 AC 100, 116 (Lord Bingham).

<sup>76</sup> See *Theophanous* (1994) 182 CLR 104, 149 (Brennan J).

<sup>77</sup> *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, 1626-1627 (Lord Sumption JSC).

desirable response to the relevant social problem, or to substitute their own judgment for that of the legislature. Rather, they need only determine whether a law meets the basic standard of reasonableness set by the elements of the proportionality test. This ensures that courts focus on determining whether the level of justification demanded as a negative jurisdictional prerequisite to the exercise of legislative power has been discharged, rather than whether the law is desirable.<sup>78</sup>

This approach to judicial review can be illustrated by the majority judgment of McLachlin J in *RJR-MacDonald Inc v Canada (Attorney General)*.<sup>79</sup> Rather than focusing on the correctness or desirability of the impugned law, McLachlin J explained that the proportionality test developed in *R v Oakes* ('*Oakes*')<sup>80</sup> required the legislature to demonstrate rationally that the burden imposed by the impugned law was 'reasonable and justifiable'.<sup>81</sup> For example, in applying the Canadian analogue of the suitability test, McLachlin J noted that the legislature need not adduce scientific evidence that empirically proves a causal link between the means adopted by the impugned law and the achievement of its purpose.<sup>82</sup> Rather, it was sufficient that the legislature assert a connection 'on the basis of evidence and logic'.<sup>83</sup> Similarly, in the application of the analogue of the necessity test, McLachlin J explained that the impugned law would pass muster if it fell within 'a range of reasonable alternatives,' irrespective of whether the court could imagine a more narrowly tailored alternative.<sup>84</sup>

This conceptualisation of judicial review informs both the structure and substance of the plurality's reasoning in *McCloy*. Structurally, it explains the division between 'compatibility testing' and 'proportionality testing'. While 'compatibility testing' involves the application of a 'rule derived from the *Constitution* itself', 'proportionality testing' is an extrinsic analytical tool for the assessment of the 'rationality and reasonableness' of the legislative course of action.<sup>85</sup> This recognises that judicial review in a culture of justification must go beyond an assessment of the positive legislative authority that determines the prima facie constitutional validity of the law, and must extend to the reasonableness of the basis for that action. In short, a legislative interference with the implied freedom must be both '*constitutionally and rationally justified*'.<sup>86</sup>

Substantively, the three elements of the proportionality test reflect the search for a rational basis or reasonable justification for legislative action that infringes the implied freedom. The suitability test recognises the logical premise that a law cannot be considered reasonable if it does not disclose some rational connection to its purpose.<sup>87</sup> The requirement that less intrusive alternative measures be both 'obvious' and 'compelling' before the impugned law will fail the necessity test ensures that only clearly unreasonable legislative choices will be struck down at this stage. Reasonable legislative choices will fall within the range of permissible alternatives irrespective of whether they are sub-optimal or less desirable than others. The 'balancing' test protects against unreasonable overestimations of the benefit or social importance of achieving

<sup>78</sup> See *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 796, 844-845 (Lord Bingham).

<sup>79</sup> [1995] 3 SCR 199 ('*RJR-MacDonald*').

<sup>80</sup> [1986] 1 SCR 103.

<sup>81</sup> *RJR-MacDonald* [1995] 3 SCR 199, 329, 333.

<sup>82</sup> *Ibid* 339.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid* 342.

<sup>85</sup> *McCloy* (2015) 325 ALR 15, 33.

<sup>86</sup> *Ibid* 38 (emphasis added).

<sup>87</sup> *Ibid* 36 (French CJ, Kiefel, Bell and Keane JJ).

the law's purpose by requiring the legislature to assign a reasonable or 'proper weight' to all of the relevant factors that guide its decision making.<sup>88</sup> Indeed, as was recently, and perhaps not coincidentally,<sup>89</sup> recognised by the High Court in the administrative law context, an exercise of discretion which accords excessive or disproportionate weight to a particular factor is indicative of unreasonableness.<sup>90</sup> Importantly, the plurality suggests that a court applying its proportionality test need only determine whether the balance struck by the legislature is 'adequate', in the sense that the burden on the freedom is not 'impermissible' or 'undue'.<sup>91</sup> This, again, suggests that there are a range of reasonable legislative responses that will pass the balancing test.

### B *Gageler J: Preventing 'Systemic Risk'*

In *McCloy*, Gageler J explained that the function of judicial review in the context of the implied freedom was to protect against legislation that poses a 'systemic risk' to representative and responsible government.<sup>92</sup> Accordingly, as was discussed in Part I, Gageler J formulated a spectrum of scrutiny pursuant to which the choice of a standard of review is to be determined by the degree of systemic risk generated by the law.<sup>93</sup> There are two potential explanations for this approach. First, it seeks to ensure that judicial review does not function so as to extend the scope of the implied freedom beyond the 'logical and practical necessity' which gave rise to its implication.<sup>94</sup> A uniform standard of review that is less attuned to the risk posed by the impugned law to the system of representative and responsible government which the implied freedom functions to protect may be apt to loose the implied freedom from its constitutional moorings.<sup>95</sup> A similar rationale prompted the rejection of a separate discrimination limb of the *Melbourne Corporation* doctrine in *Austin v Commonwealth*.<sup>96</sup> As Gaudron, Gummow and Hayne JJ there explained, a separate limb that prohibits laws imposing discriminatory burdens on States irrespective of whether such burdens endangered their ability to function as independent polities was not appropriate for a doctrine predicated on an implication derived from the constitutional assumption of the continuing existence of States as separate self-governing entities.<sup>97</sup>

However, it is also possible to read the basis of the spectrum of scrutiny as part of a broader conceptualisation of the function of judicial review within the system of representative government. As his Honour explained prior to his call to the bar, the judiciary is not an external observer of the functioning of the constitutional system of government that merely declares uniform legal limits on legislative and executive power.<sup>98</sup> Rather, as he discussed during his tenure as Commonwealth Solicitor-General, the judiciary is a component part of that system which is tasked with the

<sup>88</sup> Aharon Barak, above n 68, 374-375. See, eg, Jeremy Kirk, above n 42, 9.

<sup>89</sup> Sir Anthony Mason, 'Proportionality and its Use in Australian Constitutional Law' (Speech delivered at the Melbourne Law School, University of Melbourne, 6 August 2015) 58:12-58:40.

<sup>90</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 352 (French CJ), 366 (Hayne, Kiefel and Bell JJ).

<sup>91</sup> *McCloy* (2015) 325 ALR 15, 19, 37.

<sup>92</sup> *Ibid* 44.

<sup>93</sup> *Ibid* 52. See also *Tajjour* (2014) 88 ALJR 860, 894 (Gageler J).

<sup>94</sup> See *ACTV* (1992) 177 CLR 106, 135 (Mason CJ).

<sup>95</sup> See *McCloy* (2015) 325 ALR 15, 49, 51-52 (Gageler J).

<sup>96</sup> (2003) 215 CLR 185.

<sup>97</sup> *Ibid* 258-259. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

<sup>98</sup> Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 176.

preservation and maintenance of its effective functioning as the ‘ordinary means’ of containing governmental power.<sup>99</sup> This approach draws on John Hart Ely’s proceduralist account of judicial review in the United States, which sought, perhaps unsuccessfully,<sup>100</sup> to eschew judicial consideration of ‘substantive values’ better resolved by political debate in favour of a focus on the protection of the political process and the promotion of access to it.<sup>101</sup>

Such a proceduralist approach to judicial review has a number of implications for the standard of review to be applied in any given case. While deferential standards should be adopted where political accountability is an effective limitation on legislative and executive power, vigilant standards should be adopted where those mechanisms are either ‘weak’ or ‘endangered’ by the impugned law.<sup>102</sup> This mirrors Stone J’s suggestion in his ‘famous footnote’ in *United States v Carolene Products Co* that legislation that ‘restricts ... political processes’ may be ‘subject to more exacting judicial scrutiny’ under the Fourteenth Amendment than ‘most other types of legislation’.<sup>103</sup> As Gageler explains, the application of this theory of judicial review allows the judiciary to ‘reconcile’ the competing legal and political constitutionalisms that underpin the *Constitution* by accepting the ‘primacy’ of the political process as a means of limiting legislative and executive power, but remaining ‘responsive to its weaknesses’.<sup>104</sup>

Gageler J’s judgment in *McCloy* is a good example of an application of this proceduralist theory of judicial review. The theory pervades his insistence that the ‘preservation of the integrity of the system of representative and responsible government’ is the proper touchstone for determining the validity of an impugned law.<sup>105</sup> It underpins the proposition that the standard of review should become more exacting as the degree of risk posed by the impugned law to that system increases.<sup>106</sup> More specifically, it explains his choice of an exacting standard of review for the impugned law at issue. Gageler J suggested that systemic risk is particularly high in two circumstances. First, systemic risk may be high when the impugned law endangers the operation of the system, such as where an impugned law imposes content based restrictions on political communication, restrictions on inherently political communication, or restrictions in the context of elections.<sup>107</sup> Secondly, systemic risk may be high where the mechanisms of political accountability are particularly weak or insufficient, such as where the impugned law targets ‘unfavourable’ or ‘uninteresting’ political speech.<sup>108</sup> The burden imposed on political communication in *McCloy* fell into the first category, given that the restrictions operated in the context of the ‘conduct of

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<sup>99</sup> Stephen Gageler, ‘Beyond the Text: A Vision of the Structure and Function of the Constitution’ (2009) 32 *Australian Bar Review* 138, 152.

<sup>100</sup> See Laurence H. Tribe, ‘The Puzzling Persistence of Process-Based Constitutional Theories’ (1980) 89 *Yale Law Journal* 1063, 1065, 1068-1071, 1077-1078.

<sup>101</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 74-75, 103.

<sup>102</sup> Stephen Gageler, above n 99, 152, 155.

<sup>103</sup> 304 US 144, 152-153 fn 4 (1938).

<sup>104</sup> Stephen Gageler, above n 98, 184, 198

<sup>105</sup> *McCloy* (2015) 325 ALR 15, 47.

<sup>106</sup> *Tajjour* (2014) 88 ALJR 860, 894.

<sup>107</sup> *McCloy* (2015) 325 ALR 15, 44, 52.

<sup>108</sup> *Ibid* 43-44.

elections for political office'.<sup>109</sup> Accordingly, Gageler J adopted an intense standard of review.<sup>110</sup>

### C Conclusion

The significant differences between the approaches adopted by the plurality and Gageler J can be explained with reference to the distinct conceptualisations of the function of judicial review in a representative democracy that underpin both approaches. Both of the conceptualisations are defensible, and it is difficult to determine at the abstract level which is preferable. While Gageler J's approach is perhaps more securely tethered to the text and structure of the *Constitution*, his Honour is content to draw on extrinsic materials to elucidate its history and contemporary functioning.<sup>111</sup> Similarly, while the plurality's focus on the reasonableness of legislative action may sit uneasily with the legalist tradition in Australian constitutional law,<sup>112</sup> these concepts now have a long history of judicial use.<sup>113</sup> While the plurality's approach is better aligned with public law throughout the rest of the common law world, there may be questions as to whether this is an appropriate consideration in light of national peculiarities.<sup>114</sup> Neither approach avoids complex value judgments, but neither purports to.<sup>115</sup> Ultimately, the suitability and sustainability of each approach will be determined by their practical operation in concrete cases. This will be addressed in the subsequent sections.

## III THE COMPELLING PURPOSE TEST AND BALANCING

As was discussed above, the first step of the third stage of the standard applied by Gageler J in *McCloy* requires courts to determine whether the purpose of a law which creates a high degree of systemic risk is 'compelling',<sup>116</sup> or 'pressing and substantial'.<sup>117</sup> This test may require courts to engage in an abstract and artificial balancing exercise which is inherently difficult for the judiciary to undertake and which leaves too much to unguided judicial discretion. The plurality's balancing test avoids this artificiality, and provides the judiciary with better tools to guide the exercise of its discretion.

### A The Compelling Purpose Test

Gageler J's compelling purpose test is similar to the 'pressing and substantial concern' test adopted in Canada,<sup>118</sup> and the 'compelling governmental interest' or

<sup>109</sup> Ibid 53.

<sup>110</sup> Ibid 53.

<sup>111</sup> See *McCloy* (2015) 325 ALR 15, 42-44.

<sup>112</sup> See *Leask v Commonwealth* (1996) 187 CLR 579, 602 (Dawson J).

<sup>113</sup> *Rowe* (2010) 243 CLR 1, 133-139 (Kiefel J).

<sup>114</sup> See *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178-179 (Gleeson CJ); Chief Justice Robert French, 'The Globalisation of Public Law – A Quilting of Legalities' (Speech delivered at the Cambridge Public Law Conference, Cambridge, 12 September 2016) 2-3, 67.

<sup>115</sup> *McCloy* (2015) 325 ALR 15, 38 (French CJ, Kiefel, Bell and Keane JJ), 52 (Gageler J).

<sup>116</sup> Ibid 39-40, 53, 60.

<sup>117</sup> *Tajjour* (2014) 88 ALJR 860, 894.

<sup>118</sup> See *Oakes* [1986] 1 SCR 103, 138-139 (Dickson CJ); *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 SCR 3, 74-75 (McLachlin CJ and LeBel J).

‘pressing public necessity’ standards used as part of the American strict scrutiny test.<sup>119</sup> As Dieter Grimm has argued in his analysis of the Canadian test, the necessarily ‘correlational’ or relative nature of the concept of importance indicates that such tests require courts to engage in an abstract balancing exercise to determine whether the purpose of the law is *sufficiently* important to justify its burden on the relevant right or freedom.<sup>120</sup> A similar point has been made with respect to the American test.<sup>121</sup>

In *McCloy*, the purpose and subject matter of the law was not such that Gageler J was required to engage in a balancing exercise involving the weighing of competing interests or principles. Rather, the importance of the purpose was determined by assessing its potential beneficial effect on the system of representative and responsible government.<sup>122</sup> However, this approach cannot be adopted where the purpose and subject matter of the law involve a competing public interest unrelated to the system of representative and responsible government.<sup>123</sup> For example, in *Levy v Victoria* (*‘Levy’*), in which the purpose of the impugned law related to the preservation of public safety,<sup>124</sup> the High Court could only determine whether the purpose of the regulations was sufficiently important to be characterised as compelling by balancing the interest in free political communication against the competing interest in public safety.<sup>125</sup> Though the burden on political communication imposed by the regulation impugned in *Levy* may not have created the degree of systemic risk necessary to require courts applying Gageler J’s test to search for a compelling purpose, it is conceivable that a legislature may pass a law which does create a high degree of systemic risk for the purposes of protecting public safety. Restrictions on inherently political communications in support of the extremist views of a political organisation which advocates violence is one such conceivable example.

There are two problems with this abstract balancing exercise. First, a focus on the importance of the purpose in the abstract is artificial. In order properly to determine the importance of a given statutory object it is necessary to consider the degree to which that object is achieved by the particular law.<sup>126</sup> It would, for example, be artificial to characterise the purpose of a law as ‘compelling’ if, in practice, it was likely to achieve a slight reduction in the harm that it sought to mitigate.<sup>127</sup> It would be similarly unrealistic if the statute achieved a limited marginal reduction in harm on the basis that common law rules operating with respect to the same subject matter already achieved the statutory objective to a similar extent.<sup>128</sup>

<sup>119</sup> See *Citizens United v Federal Election Commission*, 558 US 310, 340 (Kennedy J) (2010); *Grutter v Bollinger*, 539 US 306, 323, 326 (O’Connor J) (2003).

<sup>120</sup> Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383, 388.

<sup>121</sup> See Jud Mathews and Alec Stone Sweet, ‘All Things in Proportion? American Rights Review and the Problem of Balancing’ (2011) 60 *Emory Law Journal* 798, 829-831; Stephen E. Gottlieb, ‘Compelling Governmental Interests and Constitutional Discourse’ (1992) 55 *Albany Law Review* 549, 551.

<sup>122</sup> *McCloy* (2015) 325 ALR 15, 59-60.

<sup>123</sup> Nicholas Aroney, ‘Justice McHugh, Representative Government and the Elimination of Balancing’ (2006) 28 *Sydney Law Review* 505, 521-522; James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 5th ed, 2015) 589.

<sup>124</sup> (1997) 189 CLR 579, 620 (McHugh J).

<sup>125</sup> Nicholas Aroney, above n 123, 524-525. See, eg, *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, 765 (Lord Hope).

<sup>126</sup> Richard H. Fallon, ‘Strict Judicial Scrutiny’ (2007) 54 *University of California Los Angeles Law Review* 1267, 1324.

<sup>127</sup> See *ibid* 1325.

<sup>128</sup> See *ibid* 1324.

A narrower articulation of the purpose that it is more closely aligned with the actual operation of the law could be an antidote for this problem. For example, in *Monis v The Queen* ('*Monis*'), French CJ found the purpose of the impugned law to be the 'prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive'.<sup>129</sup> However, this approach runs into another difficulty. As Cromwell J of the Supreme Court of Canada recently explained in *R v Moriarity* ('*Moriarity*'), such a narrow articulation of the purpose of the law would 'foreclose' an enquiry into the relationship between the purpose and the means adopted to achieve it.<sup>130</sup> It would render Gageler J's overbreadth enquiry otiose by ensuring that the purpose of the law and its legal operation were always more or less coextensive.<sup>131</sup>

Secondly, the abstract balancing exercise is inherently difficult for a court to undertake. For example, if the compelling purpose test was to be applied to the impugned offence in *Coleman*, which proscribed the use of insulting words in or near a public place for the purposes of preventing breaches of the peace, forestalling the intimidation of third parties, and lessening the risk of psychological and emotional harm to third parties,<sup>132</sup> it would be very difficult to find a constitutional basis on which to determine in the abstract whether these purposes are sufficiently important to be characterised as 'compelling' or 'pressing and substantial' in the constitutionally prescribed system of representative and responsible government. On one hand, as Heydon J explained, the use of insulting words may reduce the quality of political discussion and compel persons to 'withdraw from public debate', and their presence in political discourse does little to assist voters in making informed electoral choices.<sup>133</sup> On the other hand, as both McHugh and Kirby JJ recognised in their separate judgments, the use of insulting words is a common and well established feature of Australian political debate which ought to be protected.<sup>134</sup> As Stone has explained, the text and structure of the *Constitution* and the contemporary and historical operation of the system of representative and responsible government provide little guidance as to which assessment of the importance of the purpose of the offence is preferable.<sup>135</sup> Ultimately, a highly discretionary judgment is likely to be determinative.<sup>136</sup>

### B *The Plurality's Balancing Test*

The plurality's balancing test does not require the purpose of the law considered in the abstract to be characterised as 'compelling'. Rather, the purpose need only be legitimate, in the sense that it is 'compatible' with the system of representative and responsible government.<sup>137</sup> This requires courts to determine whether the terms or operation of the law are such as to detract from what is necessary for the maintenance or effective operation of that system.<sup>138</sup> Such an inquiry does not require an assessment of whether the purpose of the impugned law is sufficiently important or weighty to be considered 'compelling'. It involves a consideration of whether the terms or purpose of

<sup>129</sup> (2013) 249 CLR 92, 133-134.

<sup>130</sup> [2015] SCC 55, [24], [27]-[28] ('*Moriarity*'). See also James Stellios, above n 123, 592.

<sup>131</sup> *Moriarity* [2015] SCC 55, [24].

<sup>132</sup> *Coleman* (2004) 220 CLR 1, 53 (McHugh J), 121-122 (Heydon J).

<sup>133</sup> *Ibid* 121, 125-126.

<sup>134</sup> *Ibid* 54 (McHugh J), 91 (Kirby J).

<sup>135</sup> Adrienne Stone, 'Insult and Emotion, Calumny and Inveective': Twenty Years of Freedom of Political Communication' (2011) 30 *University of Queensland Law Journal* 79, 95-96.

<sup>136</sup> *Ibid* 95.

<sup>137</sup> *McCloy* (2015) 325 ALR 15, 18, 32-33.

<sup>138</sup> *Ibid* 18, 37; Nicholas Aroney, above n 123, 533.

the law can be construed in a manner which does not take away the essential content of the system of representative and responsible government.<sup>139</sup> The importance of the purpose of the impugned law is not relevant.

All balancing is reserved for the final stage of the proportionality analysis, at which the character of the balancing exercise engaged in is fundamentally different. While the plurality does suggest that the balancing test may involve an assessment of the importance of the purpose in the abstract,<sup>140</sup> their Honours also place emphasis on ‘the *positive effects* of realising the law’s proper purpose’, or the ‘*benefits gained* by the law’s policy’.<sup>141</sup> In other words, the balancing enquiry involves a cost benefit analysis that compares the foreseeable beneficial and disadvantageous effects of the law within the context of its operation.

This mirrors the accepted international approach to the balancing test, which focuses on the actual or foreseeable positive and negative consequences of the law. As Barak explains, balancing requires a comparison of the marginal benefits of the law and the marginal detriments caused by the burden on the constitutional right or freedom.<sup>142</sup> A focus on the actual marginal benefits of the law allows the court to take into account the extent to which the purpose might already have been achieved by other laws, the probability that the law will achieve its purpose, and the precise extent to which it is likely to do so.<sup>143</sup> So understood, the balancing test requires the court to hold invalid laws which represent ‘unbalanced solutions’ that ‘result in a recognisable net loss’.<sup>144</sup>

This approach was applied by Barak as President of the Supreme Court of Israel in *Adalah Legal Centre for Arab Minority Rights in Israel v Minister of Interior* (‘*Adalah*’)<sup>145</sup> and *Beit Sourik Village Council v Israel* (‘*Beit Sourik*’),<sup>146</sup> both of which were decided at the balancing stage of the proportionality test. In his dissenting judgment in *Adalah*, Barak P upheld a challenge to a law that prohibited the granting of Israeli citizenship and residential permits to residents of areas such as the Gaza Strip on the basis that the additional security advantage obtained by replacing the previous regime of stringent individual checks with a complete prohibition on migration was outweighed by the additional violation of the right to human dignity caused by the change in policy.<sup>147</sup>

Barak P employed a similar reasoning process in his majority judgment in *Beit Sourik*, which involved a challenge to a military order requiring the seizure of land for the construction of a ‘separation fence’ along a proposed route in the West Bank.<sup>148</sup> The applicants suggested an alternative route which would interfere with its property rights to a lesser extent. Barak P determined that the marginal injury that would be caused to the proprietary rights of the applicants by building the fence along the proposed route instead of the alternative route was disproportionate to the marginal ‘security advantage’ of building the fence on the proposed route instead of the

<sup>139</sup> See Nicholas Aroney, above n 123, 533.

<sup>140</sup> *McCloy* (2015) 325 ALR 15, 19, 37-38.

<sup>141</sup> *Ibid* 37 (emphasis added).

<sup>142</sup> Aharon Barak, above n 68, 351.

<sup>143</sup> *Ibid* 357-358.

<sup>144</sup> Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge Law Journal* 174, 201.

<sup>145</sup> [2006] H CJ 7052/03 (‘*Adalah*’).

<sup>146</sup> [2004] H CJ 2056/04 (‘*Beit Sourik*’)

<sup>147</sup> *Adalah* [2006] H CJ 7052/03, [91].

<sup>148</sup> *Beit Sourik* [2004] H CJ 2056/04, [3]-[8].

alternative route.<sup>149</sup> The expert evidence provided by the respondent indicated that the net cost to proprietary rights substantially outweighed the ‘minute’ security benefits.<sup>150</sup>

A similar approach to balancing has been embraced in Canada. In *Oakes*, Dickson CJ adopted an abstract approach to balancing that required proportionality between the ‘objective’ itself and the detrimental effect of the law on the relevant right or freedom.<sup>151</sup> However, in *Dagenais v Canadian Broadcasting Corporation*, Lamer CJ added the additional requirement of proportionality ‘between the deleterious and salutary effects of the measures’.<sup>152</sup> More recently, the abstract component of the test endorsed in *Oakes* appears to have been dropped altogether in favour of a concrete cost benefit analysis.<sup>153</sup> For example, in *Thomson Newspapers Co v Canada (Attorney-General)* (*‘Thomson Newspapers’*), Bastarache J found that the detrimental effect of a law prohibiting the dissemination of opinion survey results in the period three days immediately prior to a federal election on the freedom of expression was disproportionate to its actual benefit.<sup>154</sup> His Honour found that the actual benefits of the law were limited on the basis that the evidence before the Court indicated that the mischief targeted by the impugned law would rarely arise.<sup>155</sup> McLachlin CJ reached the opposite conclusion in *Alberta v Hutterian Brethren of Wilson County* (*‘Hutterian Brethren’*) on the basis that a combination of logic and the evidence adduced by the appellant suggested that the beneficial effects of a universal photograph requirement for obtaining a drivers’ licence outweighed the limited financial burden on the respondents’ freedom of religion.<sup>156</sup>

This approach to balancing is not entirely novel in Australia. In his dissenting judgment in *Cunliffe*, Mason CJ engaged in a marginal cost benefit analysis to find that the social benefit of a migration agent registration scheme did not justify the burden that the law imposed on the implied freedom insofar as it applied to legal practitioners.<sup>157</sup> After stressing the need to avoid engaging in balancing ‘in the abstract or at a broad level of generality’,<sup>158</sup> Mason CJ found that the additional benefit accrued from imposing registration requirements on persons who met the rigorous standards associated with admission to the legal profession had not been established on the evidence and was accordingly outweighed by the burden on the freedom.<sup>159</sup>

### C Conclusion

The plurality’s approach to balancing avoids the two problems encountered by Gageler J’s compelling purpose test. First, the evidence of the law’s actual or predicted effect and operation provides a reasonably secure basis on which to assess whether an appropriate balance has been struck. While it does not eliminate value judgment from the equation,<sup>160</sup> and while there is an indication that the purpose considered in the abstract is still of some relevance to the enquiry, it does provide the judiciary with

<sup>149</sup> Ibid [61].

<sup>150</sup> Ibid.

<sup>151</sup> Ibid 138-139 (Dickson CJ).

<sup>152</sup> [1994] 3 SCR 835, 887-889.

<sup>153</sup> *Harper v Canada (Attorney General)* [2004] 1 SCR 827, 892 (Bastarache J); *Carter v Canada (Attorney General)* [2015] 1 SCR 331, 388 (The Court).

<sup>154</sup> [1998] 1 SCR 877, 972-973 (*‘Thomson Newspapers’*).

<sup>155</sup> Ibid 971-972.

<sup>156</sup> [2009] 2 SCR 567, 609, 615 (*‘Hutterian Brethren’*).

<sup>157</sup> *Cunliffe* (1994) 182 CLR 272, 301-304.

<sup>158</sup> Ibid 301-302.

<sup>159</sup> Ibid 304.

<sup>160</sup> *McCloy* (2015) 325 ALR 15, 35 (French CJ, Kiefel, Bell and Keane JJ).

better tools to guide its decision making than are available when abstract balancing alone is required to determine whether a purpose is compelling.<sup>161</sup> Secondly, the emphasis on the actual marginal effects of the law avoids the artificiality associated with the compelling purpose test.

It is also worth noting that the contextual focus of the plurality's balancing test may overcome Gageler J's concerns regarding the extent to which the proportionality rubric allows for the consideration of the reasons for the existence of the implied freedom of political communication and the degree of systemic risk caused by the particular burden.<sup>162</sup> For example, the Supreme Court of Canada has consistently applied the balancing test in freedom of expression cases in a manner that is attentive to both the intensity of the burden and the nature of the expression that is burdened.<sup>163</sup> Accordingly, the marginal detriment caused by the infringement will carry less weight if the nature of the expression that is burdened is tenuously related to the values which underpin the existence of the freedom,<sup>164</sup> or if the extent or intensity of the burden is limited.<sup>165</sup> In this respect, the calculation of the marginal detriment caused by the burden is likely to include an assessment of the nature and extent of the burden and its relationship to the reasons underpinning the existence of the implied freedom.

#### IV CLOSE SCRUTINY AND NECESSITY

Gageler J's spectrum of scrutiny requires courts to calibrate the intensity of judicial review of any given law to the nature and extent of the burden on the implied freedom.<sup>166</sup> In *McCloy*, the nature and extent of the burden on the freedom prompted Gageler J to apply 'close scrutiny, congruent with a search for compelling justification' in determining whether the impugned law was reasonably necessary.<sup>167</sup> The experience of courts in other jurisdictions suggests that this approach may require courts to engage in intense scrutiny where such scrutiny is impossible or inappropriate. In this respect, Gageler J's approach may prove unsustainable.

##### A *Intensity of Scrutiny in the United Kingdom*

Courts in the United Kingdom have developed a complex jurisprudence surrounding the intensity of scrutiny to be applied when engaging in judicial review of the proportionality of executive decisions.<sup>168</sup> This jurisprudence is increasingly being applied to review of legislation.<sup>169</sup> Rather than calibrating the degree of scrutiny to the

<sup>161</sup> See Aharon Barak, above n 68, 484.

<sup>162</sup> *McCloy* (2015) 325 ALR 15, 51, 52 (Gageler J).

<sup>163</sup> Chief Justice Beverly McLachlin, 'Proportionality, Justification, Evidence and Deference: Perspectives from Canada' (Speech delivered at the Hong Kong Judicial Colloquium, Hong Kong Court of Final Appeal, 24 September 2015) 22-23.

<sup>164</sup> *R v Keegstra* [1990] 3 SCR 697, 759-767, 787 (Dickson CJ); *Edmonton Journal v Alberta (Attorney-General)* [1989] 2 SCR 1326, 1355-1356 (Wilson J); *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232, 246-247 (McLachlin J).

<sup>165</sup> *R v Bryan* [2007] 1 SCR 527, 555-556 (Bastarache J); cf *Thomson Newspapers* [1998] 1 SCR 877, 971 (Bastarache J).

<sup>166</sup> *McCloy* (2015) 325 ALR 15, 52; *Tajjour* (2014) 88 ALJR 860, 894.

<sup>167</sup> *McCloy* (2015) 325 ALR 15, 52-53.

<sup>168</sup> See Paul Craig, *Administrative Law* (Sweet & Maxwell, 7<sup>th</sup> ed, 2012) 618-620, 629-630.

<sup>169</sup> See *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312, 1347-1348 (Lord Bingham) ('*Animal Defenders*'); *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, 912-913 (Lord Hope DPSC).

intensity of the burden or the nature of the right or freedom infringed, United Kingdom courts tend to adopt a lower intensity of scrutiny in circumstances in which the legislature or executive are more competent to make an accurate assessment of the relevant legislative facts.<sup>170</sup> This approach is particularly prominent where the court is required to consider ‘evaluative facts’ that involve rational but speculative predictions about human behaviour or future social, economic or political trends.<sup>171</sup> Such facts confront courts with what Yasmin Dawood calls a ‘dual challenge’.<sup>172</sup> Not only do courts lack the institutional resources to assess such evidence, it is often the case that the evidence is necessarily inconclusive and incapable of being empirically tested.<sup>173</sup> In these circumstances, courts tend to place greater weight on the primary judgment of the legislature and executive.<sup>174</sup> On the other hand, courts will more intensely scrutinise that primary judgment where the controversy has greater ‘legal content’ that falls within their institutional competence.<sup>175</sup>

For example, in *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* (‘*Carlile*’), the Supreme Court was required to assess the proportionality of an executive decision to exclude a former leader of a proscribed terrorist organisation from the United Kingdom on the basis that allowing her entry would be perceived by Iran as a hostile political move and would thereby damage the ‘imperative’ diplomatic relations between the countries.<sup>176</sup> In upholding the exclusion order, Lord Sumption JSC identified two interrelated reasons for according weight to the judgment of the Secretary that reflect the ‘dual challenge’ identified by Dawood. First, the Secretary had the benefit of access to expert diplomatic advice on which the evidence indicated that she had relied.<sup>177</sup> As Lord Neuberger PSC explained, the court did not have the relevant expertise to question the correctness of that advice.<sup>178</sup> Secondly, the predictive assessment of risk to the political and diplomatic relationship between the two countries was not a judgment that could readily be analysed empirically within the confines of the judicial process.<sup>179</sup> Accordingly, the Court could only assess the ‘rationality’ of the decision, not its correctness.<sup>180</sup> Any more intense standard of judicial scrutiny would have been impossible for the court to undertake.

### B The North American Experience

*Carlile* demonstrates that any attempt to adopt a stringent standard of judicial scrutiny in cases involving complex legislative and evaluative facts may set the court

<sup>170</sup> *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 194, 195 (Lord Hoffman); *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, 1478 (Lord Reed JSC).

<sup>171</sup> William D. Araiza, ‘Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation’ (2013) 88 *New York University Law Review* 878, 895, 908. See *A v Secretary of State for the Home Department* [2005] 2 AC 68, 102 (Lord Bingham) (‘*A*’).

<sup>172</sup> Yasmin Dawood, ‘Democracy and Deference: The Role of Social Science Evidence in Election Law Cases’ (2014) 32 *National Journal of Constitutional Law* 173, 176.

<sup>173</sup> *Ibid* 176, 178-179.

<sup>174</sup> *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 185 (Lord Bingham); Jeffrey Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] *Public Law* 592, 598.

<sup>175</sup> *A* [2005] 2 AC 68, 102 (Lord Bingham); *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] AC 945, 985 (Lord Neuberger PSC) (‘*Carlile*’).

<sup>176</sup> [2015] AC 945, 954-960 (Lord Sumption JSC).

<sup>177</sup> *Ibid* 978.

<sup>178</sup> *Ibid* 982, 984.

<sup>179</sup> *Ibid* 970 (Lord Sumption JSC).

<sup>180</sup> *Ibid*. See also *ibid* 985 (Lord Neuberger PSC).

an impossible task. As Eric Berger has argued, this difficulty has caused the United States Supreme Court ‘lazily’ to avoid the strict scrutiny test in a number of cases involving the review of complex predictive judgments.<sup>181</sup> For example, in *Holder v Humanitarian Law Project* (*Holder*), Roberts CJ recognised that the impugned law constituted a content based regulation of speech that infringed the First Amendment, and accordingly rejected a submission that intermediate scrutiny applied.<sup>182</sup> However, as Breyer J explained in dissent, Roberts CJ did not proceed to apply the strict scrutiny test.<sup>183</sup> Nor, as Berger recognises in his analysis, did Roberts CJ cite or apply the ‘imminent lawless action’ test developed in *Brandenburg v Ohio*<sup>184</sup> that is ordinarily applied in cases such as *Holder*.<sup>185</sup> Rather, Roberts CJ simply dismissed the submissions relating to the First Amendment after stressing the special institutional competence of the executive and legislature and noting that the evaluative facts involved in the case were necessarily inconclusive.<sup>186</sup> This illustrates the potential unsustainability of standards of review that require intense judicial review and compelling justification in the face of complex evaluative facts.

These difficulties have also prompted a progressive dilution of the *Oakes* test in Canada.<sup>187</sup> For example, in *Oakes*, Dickson CJ formulated a ‘minimal impairment’ test by announcing that the legislation should impair the right or freedom ‘as little as possible’.<sup>188</sup> The strictness of this standard was relaxed in cases involving complex evaluative facts. In *Irwin Toy Ltd v Quebec*, it was held that the government need only demonstrate that it had a ‘reasonable basis’ on the evidence adduced for concluding that the means adopted impaired the right or freedom as little as possible in circumstances in which ‘the Court is called upon to assess competing social science evidence’.<sup>189</sup> This ‘reasonable basis’ standard of review was applied by La Forest J in *McKinney v University of Guelph* on the basis that the nature of the evidence on which the impugned mandatory retirement scheme was necessarily based was not susceptible to empirical analysis by the Court.<sup>190</sup> McLachlin CJ and LeBel J recently captured the contemporary approach to the test in *Mounted Police Association of Ontario v Canada (Attorney-General)*, in which their Honours noted that the government is no longer ‘required to pursue the least drastic means of achieving its objective’, but need only demonstrate that it employed a measure that ‘falls within a range of reasonable alternatives’.<sup>191</sup>

The ‘rational connection’ test has been similarly diluted. In *R v Edwards Books and Art Ltd* (*Edwards Books*), Dickson CJ stated that the test established in *Oakes* required the court to assess ‘how well the legislative garment has been tailored to suit its purpose’ with reference to concepts such as under-inclusiveness.<sup>192</sup> However,

<sup>181</sup> Eric Berger, ‘Deference Determinations and Stealth Constitutional Decision Making’ (2013) 98 *Iowa Law Review* 465, 488-489.

<sup>182</sup> 561 US 1, 26-28 (Roberts CJ) (2010) (*Holder*).

<sup>183</sup> *Ibid* 62.

<sup>184</sup> 95 US 444, 447 (The Court) (1969).

<sup>185</sup> Eric Berger, above n 168, 488-489.

<sup>186</sup> *Holder*, 561 US 1, 33-35 (2010).

<sup>187</sup> Sujit Choudry, ‘So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’ (2006) 34 *Supreme Court Law Review* (2d) 501, 503-504, 524; Janet L. Hiebert, above n 73, 62, 70-79.

<sup>188</sup> *Oakes* [1986] 1 SCR 103, 139. See also *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352.

<sup>189</sup> [1989] 1 SCR 927, 994 (Dickson CJ, Lamer and Wilson JJ).

<sup>190</sup> [1990] 3 SCR 229, 304.

<sup>191</sup> [2015] 1 SCR 3, 77.

<sup>192</sup> [1986] 2 SCR 713, 770-772 (*Edwards Books*).

Sopinka J later suggested in *R v Butler* that a rational connection could be found on the basis of a ‘reasonable’ or ‘logical’ presumption of the potential effect of the law where the court was confronted with necessarily inconclusive evaluative facts.<sup>193</sup> This has prompted a retreat from the insistence on proof of a precisely tailored connection between the means and the ends in *Edwards Books*. Majority judgments in more recent cases, such as *Thomson Newspapers* and *Hutterian Brethren*, have stressed that the test will be satisfied if it could reasonably be supposed that the means adopted may further the purpose to some degree.<sup>194</sup> Indeed, in *Moriarty*, Cromwell J explained that the question is now ‘whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose’.<sup>195</sup>

### C Comparing the Approaches in *McCloy*

The preceding analysis highlights a key difficulty with Gageler J’s approach. By insisting that the standard of review in any given case is to be determined by the nature and extent of the burden on the implied freedom, Gageler J’s spectrum of scrutiny could require courts to engage in ‘close scrutiny’ of the legislation in cases in which the nature of the evidence on which a government seeks to justify the impugned legislation is such that it is either impossible or inappropriate for the court to do so. For example, Dickson CJ’s judgment in *Edwards Books* suggests that the overbreadth enquiry used by Gageler J in *McCloy* could be difficult to undertake with any precision where the legislature has imposed a bright line rule on the basis of inconclusive evaluative facts in order to formulate a law of general application.<sup>196</sup> This has been recognised as a reason for according weight to the judgment of the legislature or executive in the United Kingdom.<sup>197</sup>

This concern is unlikely to be alleviated by Gageler J’s insistence that the means adopted by the impugned law need only be ‘reasonably’ necessary for achieving its purpose. Questions would have to be asked as to what ‘close scrutiny’ and ‘compelling justification’ actually mean if the ‘reasonably’ qualification allowed courts to accord substantial weight to the judgment of the legislature in cases in which intense judicial scrutiny of legislation is impossible or inappropriate. In such circumstances, the phrases would serve only to obscure a more subtle process of judicial reasoning about the appropriate intensity of review that takes into account the nature of the facts at issue and the comparative institutional competence of the court and the legislature.<sup>198</sup> More fundamentally, it would magnify the primary problem with Gageler J’s spectrum of scrutiny. The experience of the Supreme Courts of the United Kingdom, Canada and the United States suggests that, when faced with such difficulties, courts may deviate towards a form of ‘rational basis’ review not dissimilar to that which Gageler J proposes at the lower end of the spectrum of scrutiny. This indicates that the very basis of an approach to determining the appropriate standard of review which depends solely on the nature and extent of the burden on the implied freedom at issue may be unsustainable.

<sup>193</sup> [1992] 1 SCR 452, 502.

<sup>194</sup> *Thomson Newspapers* [1998] 1 SCR 877, 879 (Bastarache J); *Hutterian Brethren* [2009] 2 SCR 567, 607-615 (McLachlin CJ).

<sup>195</sup> [2015] SCC 55, [49]. See also *Canada (Attorney-General) v Bedford* [2013] 3 SCR 1101, 1150 (McLachlin CJ).

<sup>196</sup> *Edwards Books* [1986] 2 SCR 713, 781-782.

<sup>197</sup> *Animal Defenders* [2008] 1 AC 1312, 1347-1348 (Lord Bingham); *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, 3853-3856 (Lord Sumption and Lord Reed JJSC).

<sup>198</sup> See Lord Sumption, above n 63, 7.

The plurality's approach avoids these difficulties. The 'obvious' and 'compelling' qualifications adopted as part of the necessity test allow courts to avoid a close analysis of the proposed alternative measures where the evidence is such that it cannot clearly determine whether those measures are less restrictive and equally effective. Rather, courts will only hold that an impugned law is invalid if it is clear that the alternative measures are less restrictive and equally effective. This was the case in *Betfair Pty Ltd v Western Australia*, in which the High Court had before it a regulatory statute in force in another jurisdiction that was plainly less restrictive than the absolute prohibition on betting exchanges that was at issue.<sup>199</sup> Equally, the suitability test that the plurality proposes already accords with the less stringent approach embraced by Cromwell J in *Moriarty*. The plurality judgment in *McCloy* suggests that a law will fail the suitability test where it is 'not possible to discern' how it will further its purpose.<sup>200</sup>

It could be argued that courts would be required to make an empirical assessment of inconclusive evaluative facts at the balancing stage of the plurality's approach in order to attempt to quantify the beneficial effects of a law that seeks to prevent a risk from materialising. For example, in his dissenting judgment in *Carlile*, Lord Kerr JSC found that the 'inherent unpredictability' and 'general, non-specific nature' of the risk to diplomatic relations between the United Kingdom and Iran indicated that the beneficial effects of the law were speculative and insufficiently compelling to justify the detrimental effect of the exclusion order.<sup>201</sup> However, three factors indicate that this is not necessarily the case. First, the probability of the risk materialising is not the only consideration which courts will use to determine the beneficial effects of a law. Considerations such as the potential quantum of the harm and its potential effect on the public interest are also taken into account.<sup>202</sup> For example, Lord Sumption JSC noted that the 'importance' of preventing the 'potential threats to national security and public safety' that could result from a deterioration in diplomatic relations was such that the beneficial effects of the exclusion order were 'significant' irrespective of the difficulty in quantifying the probability of the risk.<sup>203</sup>

Secondly, as discussed above, courts have tended to accord significant weight to legislative predictions and estimates of the probability of the risk materialising that is proposed by the executive or legislature.<sup>204</sup> For example, in *Beit Sourik*, Barak P accepted the Military Commander's judgment of the security risk of building the 'separation fence' along the alternative route and used this judgment as the basis for the balancing test.<sup>205</sup> This can be distinguished from cases such as *R (Aguilar Quila) v Secretary of State for the Home Department* ('*Aguilar Quila*'), in which Lord Wilson JSC found the impugned Rule to be unbalanced on the basis that the Secretary had not even attempted to assess the probability of the risk materialising.<sup>206</sup> Thirdly, as Laws LJ recently suggested in *R (Miranda) v Secretary of State for the Home Department*, courts will only interfere with legislative or executive action at the balancing stage in a 'plain case'.<sup>207</sup> In *Aguilar Quila*, for example, Baroness Hale DPSC stressed the fact

<sup>199</sup> (2008) 234 CLR 418, 479-480 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). See also *Monis* (2013) 249 CLR 92, 214 (Crennan, Kiefel and Bell JJ).

<sup>200</sup> (2015) 325 ALR 15, 30.

<sup>201</sup> *Carlile* [2015] AC 945, 1012, 1014-1015.

<sup>202</sup> Aharon Barak, above n 68, 257-358.

<sup>203</sup> *Carlile* [2015] AC 945, 980.

<sup>204</sup> See *Bank Mellat* [2014] 2 AC 700, 805 (Lord Reed JSC); *Hutterian Brethren* [2009] 2 SCR 567, 608 (McLachlin CJ).

<sup>205</sup> *Beit Sourik* [2004] HCJ 2056/04, [61].

<sup>206</sup> [2012] AC 621, 648 ('*Aguilar Quila*').

<sup>207</sup> [2014] 1 WLR 3140, 3156. See also *Carlile* [2015] AC 945, 971-972 (Lord Sumption JSC)

that the ‘scale and severity’ of the burden on the relevant right was clearly disproportionate to the foreseeable benefits of the impugned Rule.<sup>208</sup> An approach to balancing which takes into account these two factors may achieve the plurality’s goal of ensuring that the balancing test is applied ‘consistently with the limits of the judicial function’.<sup>209</sup> Equally, such an approach to balancing is consistent with a focus on ‘reasoned demonstration’ and rational justification, rather than precise quantification or proof. This, at the end of the day, is what proportionality is all about.<sup>210</sup>

## V CONCLUSION

In the final paragraph of his judicial career, Heydon J said that the absence of a coherent standard of review was one of the many reasons why, in his view, the implied freedom of political communication was ‘a noble and idealistic enterprise which has failed, is failing, and will go on failing’.<sup>211</sup> *McCloy* is unlikely to draw a curtain on the debate as to the appropriate standard to be applied, nor does it account for all of the problems Heydon J identified in *Monis*. However, it does seem that the structured proportionality test adopted by the plurality is reasonably appropriate and adapted to the task of providing a more secure and logical basis for assessing the validity of laws that burden the implied freedom. As has been explained above, the plurality’s approach is supported by a justifiable vision of the appropriate function of judicial review in a representative democracy, and better respects the limited institutional competence of courts than Gageler J’s alternative.

It is often too simply assumed that proportionality is an affront to the separation of powers.<sup>212</sup> This article has suggested that such an assumption may be misplaced if applied to the approach adopted by the plurality. Its focus on the identification of a rational basis for legislation, rather than on its desirability, respects the separation of powers by requiring the judiciary to accept reasonable justifications for legislative action.<sup>213</sup> It provides a wide margin of legislative discretion in circumstances in which courts cannot accurately assess the implications of complex evaluative facts for the validity of impugned restrictions of the implied freedom. In this respect, proportionality may be less estranged from orthodox conceptualisations of the judicial role than was previously thought.

The various judgments in *Murphy v Electoral Commissioner*,<sup>214</sup> which considered the use of proportionality analyses in the context of an alleged restriction on the federal franchise, suggests that the High Court will be careful to ensure that the plurality’s approach in *McCloy* is not misapplied in a manner or in a context that upsets the separation of powers. For example, French CJ and Bell J noted that the analysis is ‘inapposite’ where the only relevant burden is an ‘omission’ by the legislature to adopt less restrictive policies.<sup>215</sup> Proportionality analysis in such a context would involve an impermissible judicial exercise in ‘improved legislative design’.<sup>216</sup> Gordon J suggested

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<sup>208</sup> *Aguilar Quila* [2012] AC 621, 653-654.

<sup>209</sup> *McCloy* (2015) 325 ALR 15, 19.

<sup>210</sup> *RJR-MacDonald* [1995] 3 SCR 199, 329 (McLachlin J).

<sup>211</sup> *Monis* (2013) 249 CLR 92, 184.

<sup>212</sup> See Paul Craig, ‘Proportionality, Rationality and Review’ [2010] *New Zealand Law Review* 265, 294.

<sup>213</sup> Janina Boughey, ‘The Reasonableness of Proportionality in the Australian Administrative Law Context’ (2015) 44 *Federal Law Review* 59, 84.

<sup>214</sup> (2016) 90 ALJR 1027.

<sup>215</sup> *Ibid* 1040.

<sup>216</sup> *Ibid* 1039 (French CJ and Bell J). See also *ibid* 1051 (Gageler J).

that the application of a strict necessity test in a context in which the legislature had a constitutional duty to provide a legislative scheme would have a similar effect.<sup>217</sup> Nonetheless, French CJ and Bell J recognised that, kept within proper confines, the approach adopted by the plurality in *McCloy* was not an ‘exotic jurisprudential pest’ which would destroy ‘the delicate ecology of Australian public law’.<sup>218</sup> Gageler J accepted that its three components were ‘within the Court’s institutional competence’.<sup>219</sup> With this in mind, it will be interesting to see how much further proportionality analyses will be allowed to penetrate into the constitutional and administrative law ecosystem in future cases.

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<sup>217</sup> Ibid 1079-1080

<sup>218</sup> Ibid 1039.

<sup>219</sup> Ibid 1050.

