WALKING THE TIGHTROPE BETWEEN LEGALITY AND LEGITIMACY

Taking Rights Balancing Seriously

The discourse of proportionality and balancing permeates constitutional rights scholarship, and numerous scholars have proffered a plethora of normative justifications for proportionality-based balancing in contemporary democratic societies. Parliamentary sovereignty in its Diceyan conception often clashes with enshrined constitutional rights, leaving the Judiciary in an unenviable position to resolve this conflict in a principled manner. This article analyses how courts engage with the principle of proportionality-based balancing in determining the validity of laws limiting constitutional rights. By focusing on the free speech jurisprudence of Singapore and Australia, it discusses how courts in these jurisdictions negotiate the tightrope between fidelity to the written text of the constitution and a commitment to their role as guardians of fundamental rights and liberties.

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I. Introduction

1 Balancing is a difficult act. It suggests an adroit exercise of skill, artistry and judgment, but at the same time, it connotes a sense of instability and danger. In a circus tightrope act, successful balancing often invites rapturous applause and admiration; however, a failure to maintain equilibrium can have tragic outcomes. The metaphor of balancing in constitutional adjudication generally "refers to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests".[1] As Jaclyn Neo aptly and succinctly remarked: "[b]alancing is invoked to explain and justify the outweighing of a right/interest over another, or alternatively, to

1 T Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 at 948.

explain a rule as having struck the appropriate balance between or among different rights/interests".[2]

2 While many commentators see balancing generally as any method of resolving conflicts among values, some have distinguished balancing that establishes a substantive constitutional principle of general application (labelled "definitional" balancing) from balancing that itself is the constitutional principle (so-called "ad hoc" balancing).[3] In the US, in what is often termed "definitional balancing",[4] the US Supreme Court has adopted a tiered-scrutiny approach,[5] and has famously and consistently applied the doctrine of content neutrality to laws that abridge the freedom of speech guaranteed by the First Amendment to the US Constitution,[6] subjecting content-discriminatory laws to strict scrutiny, and content-neutral time-place-manner regulations to an intermediate scrutiny standard.[7] In other parts of the world, like in Europe, Australia and Canada, some form of proportionality test is employed in human rights and constitutional adjudication.[8] Definitional balancing is likely to be perceived as a form

2 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 159.

3 T Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 at 945. Melville Nimmer explained that "the profound difference between ad hoc and definitional balancing lies in the fact that a rules emerges from definitional balancing which can be employed in future without the occasion for further weighing of interests": Melville B Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Cal L Rev 935 at 944–945. Some scholars prefer the term "categorical" to "definitional", *eg*, Jochen von Bernstorff, "Proportionality without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination" in *Reasoning Rights: Comparative Judicial Engagement* (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds) (Hart Publishing, 2016) at p 83.

4 See Melville B Nimmer, *Nimmer on Freedom of Speech* (Matthew Bender, 1984) at paras 2.02–2.03; "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Cal L Rev 935 at 942; see also Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) at pp 546–547.

5 *United States v Carolene Products Co* 304 US 144 (1938). See generally Paul Yowell, "Proportionality in United States Constitutional Law" in *Reasoning Rights: Comparative Judicial Engagement* (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds) (Hart Publishing, 2016).

6 The Constitution of the United States.

7 *Eg*, Susan H Williams, "Content Discrimination and the First Amendment" (1991) 139 U Pa L Rev at 615; see also *RAV v St Paul* 505 US 377 (1992); *Texas v Johnson* 491 US 397 (1989); *Clark v Community for Creative Non-Violence* 468 US 288 (1984).

8 *Eg*, *Hatton v United Kingdom* (2003) 37 EHRR 611; *Boujlifa v France* (2000) 30 EHRR 419; *R v Oakes* [1986] 1 SCR 103; *Lange v Australian Broadcasting Corp*

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of *covert/opaque* balancing where judges camouflage their preferences for particular values behind a generalised rule or definitional term, while *ad hoc* balancing is arguably seen to be a more *overt/transparent* process where the court is more explicit in its identification, valuation and comparison of competing interests.[9]

3 Much has been written about the "rule of law", especially about its quintessential position in any legal system, which operates to constrain the tyranny of government and to ensure the existence of an impartial and independent judiciary.[10] AV Dicey considered the rule of law to encompass three aspects: "absolute supremacy or dominance of regular law as opposed to the influence of arbitrary power"; equality before the law; and the applicability of established principles of private/common law.[11] Although Dicey was right to note that one great virtue in the rule of law is the capacity of subjects to hold their rulers to account in the courts, his influential declaration that in a system of representative democracy, "parliamentary sovereignty was the very keystone of the constitution and the ultimate principle of legality" [references omitted], ensured that in many modern democracies founded in the Westminster tradition, the parliament's powers of legislation stood at the very apex of the legal system.[12] Herbert L A Hart then clinically constructed the positivist sovereignty doctrine in which the word of Parliament was law which no person or body could override or set aside.[13]

4 However, the rule of law is not a unitary principle but comprises a number of different dimensions; it is inevitable that the intrinsic tensions will prove to be intractably problematic. In *R (Jackson) v Attorney-General*, Lord Hope of Craighead boldly declared that:[14]

(1997) 189 CLR 520; see also Vicki C Jackson, "Constitutional Law in an Age of Proportionality" (2015) 124 Yale LJ 3094.

9 See also Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 159–160.

10 For instance, the Honourable Justice Dyson Heydon, former Justice of the High Court of Australia, identified six key characteristics of the rule of law: Dyson Heydon, "What Do We Mean by the Rule of Law?" in *Modern Challenges to the Rule of Law* (Richard Ekins ed) (LexisNexis, 2011) at p 15.

11 Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 9th Ed, 1948) at pp 202–203.

12 Philip Joseph, "The Rule of Law: Foundational Norm" in *Modern Challenges to the Rule of Law* (Richard Ekins ed) (LexisNexis, 2011) at p 69; see also *R v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 at [43].

13 See generally Herbert L A Hart, *The Concept of Law* (Clarendon Press, 2nd Ed, 1994).

14 *R (Jackson) v Attorney-General* [2005] UKHL 56 at [104].

> [P]arliamentary sovereignty is no longer, if it ever was, absolute … It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

Lord Steyn also dismissed Dicey's conceptions as outdated doctrine and noted that the incorporation of the European Convention on Human Rights ("ECHR") into English law had established a new basis of legality.[15] Other law lords and Lady Hale similarly concurred that parliamentary sovereignty must be subject to a transcendent universal principle of the rule of law, and it then falls to the duty of the courts to define the limits of the parliament's legislative powers according to the rule of law.[16] In Singapore, the courts have recently made more confident steps in the same direction,[17] while the High Court of Australia have taken bolder strides to declare both express and implied constitutional limits on legislative powers.[18] Over two centuries ago, in *Marbury v Madison*,[19] the US Supreme Court had already declared itself as the natural and legitimate authority to pronounce on the limits of the parliament's sovereign legislative powers.

5 Under this principle of legality, the limits on the parliament's legislative power are perhaps less controversially found in a written constitution as the supreme law of the land than in more abstract and contestable notions of the rule of law based on autonomy and morality. Where a written constitution grants a particular fundamental right such as freedom of speech or freedom of religion, courts in a constitutional democracy invariably engage in some form of proportionality-based

15 *R (Jackson) v Attorney-General* [2005] UKHL 56 at [102].

16 *R (Jackson) v Attorney-General* [2005] UKHL 56 at [107], [120] and [159].

17 In possibly the most emphatic and authoritative statement from the Court of Appeal to date, Sundaresh Menon CJ held in *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [1]:

> The rule of law is the bedrock on which our society was founded and on which it has thrived … But it would be meaningless to speak of [legislative] power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits …

Tan Seet Eng v Attorney-General [2016] 1 SLR 779 at [1]; see also *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525; *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1; *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710.

18 *Eg*, *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Cole v Whitfield* (1988) 165 CLR 360; *Street v Queensland Bar Association* (1989) 168 CLR 461; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

19 5 US 1 Cranch 137 (1803).

balancing to determine the *legal* limits of the parliament's legislative powers. It has been said "at this moment of history, the principle of proportionality tends to become an overarching principle of constitutional adjudication around the world" [references omitted].[20] However, proportionality is a fractious concept where scholars have expressed significant disagreement with one another on normative frameworks and appropriate methodologies. It has been disparagingly called "the *enfant terrible* of modern judging".[21] Much also has been written on proportionality, with whole books devoted to the topic: Francisco Urbina's recent critique stands at 252 pages[22] while Aharon Barak's weighty tome runs into 547 pages.[23] This article will not attempt to reconcile the different theses on constitutional rights balancing and proportionality, but will instead focus more usefully on a comparative analysis of how courts in Singapore and Australia have approached the balancing of rights in the area of freedom of speech in order to recommend a pragmatic way forward for constitutional adjudication. Ultimately, one should avoid over-theorising what is essentially a practical universal methodology of resolving constitutional rights disputes that is sensitive to particular historical bargains, social contracts, political imperatives and cultural circumstances of each jurisdiction.

II. Wading through the miasma: Whose proportionality? Which balancing?

6 In many jurisdictions, the principle of proportionality in constitutional adjudication functions as a general test of validity of laws that restrict constitutional rights. Although courts in different jurisdictions accord a different priority to a kaleidoscope of rights, norms, values and interests, some form of balancing inevitably occurs. Courts usually adopt a two-stage approach. In the first stage, the court determines whether a challenged law limits a constitutional right; if it does, then in the second stage, the court evaluates whether such a restriction is justified.[24] According to Luc Tremblay, governmental

20 Luc B Tremblay, "An Egalitarian Defense of Proportionality-based Balancing" (2015) 12 *International Journal of Constitutional Law* 864 at 889. David Beatty more boldly claimed that proportionality is "a universal criterion of constitutionality": David M Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) at p 162.

21 Patrick M McFadden, "The Balancing Test" (1988) 29 BCL Rev 585 at 586.

22 Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017).

23 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

24 Kai Möller, "Constructing the Proportionality Test: An Emerging Global Conversation" in *Reasoning Rights: Comparative Judicial Engagement* (Liora

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infringement of a constitutional right is *justified* if two conditions are satisfied. First, the legislative objective (purpose or end) must be legitimate, proper or sufficiently important. This condition may be called the "legitimacy test". Second, the relationship between the means and the ends must satisfy the principle of proportionality. This is the "proportionality test". Its formal structure provides three criteria or subtests:

> (a) There must be a "rational connection" between the means chosen and a legitimate governmental objective. This is the "rationality" or "suitability" test.
>
> (b) The limitation of a right must be "necessary" to achieve the objective. This is the "necessity" or "minimal impairment" test.
>
> (c) The harm (cost, burden and/or sacrifice) caused by the limitation must be "proportional in a strict sense" to the benefit (gains or good) it contributes to produce. This is the test of "proportionality in a strict sense (*stricto senso*)" or "proportionality in a narrow sense". It is also referred to as the "balancing test".[25]

7 The above description is widely accepted to be the gist of what proportionality-based balancing is about. However, that is where the consensus ends. In the section titled "Whose Proportionality? Which Balancing?", Urbina outlined the multifarious difficulties associated with the metaphor of balancing, such as its content, theoretical framework and methodology.[26] Grégoire Webber commented that "[d]espite the pervasiveness of balancing and proportionality in constitutional reasoning, it is not clear that recourse to these regulative ideas is at all helpful in resolving the difficult questions involved in struggling with rights-claims".[27] Indeed, Brennan J of the US Supreme Court was especially dismissive:[28]

> All of these 'balancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under

Lazarus, Christopher McCrudden & Nigel Bowles eds) (Hart Publishing, 2016) at p 31.

25 Luc B Tremblay, "An Egalitarian Defense of Proportionality-based Balancing" (2015) 12 *International Journal of Constitutional Law* 864 at 865.

26 Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press, 2017) at pp 9–12.

27 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 179.

28 *New Jersey v TLO* 469 US 325 at 469 (1985).

> which a majority that cannot agree on a genuine rationale can conceal its differences …

Nonetheless, it seems "constitutional law is now firmly settled in the age of balancing … [even though] there are different conceptions of constitutional rights reasoning".[29] Many state constitutions and international conventions do not make any explicit reference to the principle of proportionality or to balancing – despite the use of terms such as "necessary in a democratic society"[30] – but judges have invoked the concept of proportionality-based balancing when attempting to resolve the collision of rights and interests. Webber noted that:[31]

> Be it at the level of the European Court of Human Rights, the Federal Constitutional Court of Germany, the [Supreme Court of the UK] or Privy Council, the Supreme Court of Canada, the Israeli Supreme Court, or in any number of other jurisdictions, the principle of proportionality seems to have achieved the status of a received idea. Indeed, rights scholarship and jurisprudence do not, for the most part, fundamentally challenge the received approach: few question the assumptions on which it is based or whether it should be rejected in favour of an altogether alternative approach.

8 There is a plethora of conceptions of proportionality within constitutional adjudication, and the manner in which proportionality is applied differs from jurisdiction to jurisdiction. Nevertheless, Tremblay suggested that these conceptions essentially fall within two distinct modes of constitutionalism: the "priority of rights model" and the "model of optimization of values in conflict",[32] but contended that both conceptions are incompatible and are often mixed-up in cases.[33] Challenges to Robert Alexy's theory that constitutional rights should be

29 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 201.

30 *Eg*, Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), Eur TS No 5; 213 UNTS 221, 1953 UKTS No 71, Arts 8(2) and 10(2) (entered into force 3 September 1953).

31 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 191.

32 Luc B Tremblay, "An Egalitarian Defense of Proportionality-based Balancing" (2015) 12 *International Journal of Constitutional Law* 864 at 865. The first conception confers "normative priority to constitutional rights over competing norms, values and interests"; the second accords "*no* normative priority to rights over competing considerations, norms, values and interests … not even over administrative convenience, public interest, sexual morality, religious conformity and other social goals based upon utility and the perfection of individuals" [emphasis in original]; see also "An Egalitarian Defense of Proportionality-based Balancing" at 866 and 868.

33 Luc B Tremblay, "An Egalitarian Defense of Proportionality-based Balancing" (2015) 12 *International Journal of Constitutional Law* 864 at 870.

understood as principles to be optimised,[34] and to David Beatty's articulation of a common methodology that courts should employ in assessing the constitutionality of legislation,[35] have concluded that: (a) balancing is essentially a normative and politicised undertaking where "the question of the weight of an interest cannot be answered without substantive evaluations and moral judgments and thus, without contest and controversy";[36] (b) there is no common criterion for assessing the weight of an individual interest and the weight of the conflicting community interest, and absent such an identified common measure, "the principle of proportionality cannot direct reason to answer";[37] (c) if one accepts at the bare minimum that one of the objectives of a constitution is to secure the political legitimacy of the State, then "the principle of proportionality does violence to the idea of a constitution";[38] and (d) the principle of proportionality "denies categorical answers to rights-claims" as every resolution to a claim is contingent on the optimisation of the constitutional right in the particular circumstances.[39]

9 According to Rosalind Dixon, when drafting a constitution or constitutional provision, drafters face a choice between two broad approaches: a "framework-style" approach, which provides only general textual guidance as to the meaning or operation of particular constitutional norms; and a more "codified" approach, which provides greater detail or specificity regarding the intended meaning and

34 Under this approach, constitutional rights have the character of principles, which renders them especially conducive to balancing. A constitutional right has a "radiating effect" and becomes "ubiquitous" in all areas of law; when a legislative measure encumbers a constitutional right, it triggers an evaluation whether the right has been sufficiently optimised. The degree of optimisation will be contingent on the "weight" of the right in the circumstances, determined by the principle of "proportionality". Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002) at pp 7, 50, 352 and 417; "On Balancing and Subsumption: A Structural Comparison" (2003) 16 *Ratio Juris* 433 at 435–436.

35 David M Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004).

36 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 191–194. More specifically, Webber charged that the attempt to depoliticise rights by purporting to turn the moral and political evaluations into technical questions of weight and balance is futile: see "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" at 191.

37 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 194–198.

38 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 198–199.

39 Grégoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 13 *Canadian Journal of Law & Jurisprudence* 179 at 199–200.

operation of relevant constitutional norms.[40] The latter approach suggests that there is "some degree of *distrust* toward judges as constitutional interpreters" [emphasis in original] using the "formal process of constitutional design to constrain judges to consider the aims and understandings of drafters in resolving particular constitutional controversies".[41] The Singapore Constitution[42] – in particular, Art 14, which guarantees the freedom of speech exclusively to citizens – appears not only to employ a significant text-based constraint on judicial interpretive discretion, but also to indicate that "[c]onstitution-makers … have access to certain forms of specialized knowledge or experience that make them better placed in certain contexts to reach optimal constitutional decisions than subsequent decision-makers".[43]

10 Dixon also pointed out that almost all constitutional theories within the liberal tradition treat attention to a constitution's text as "at least a minimally binding constraint on judges in interpreting constitutional provisions for the first time".[44] Of course, no constitutional language can be so unequivocal that a constitutional text can be interpreted solely by reference to its plain or literal meaning; for drafters to realise their aims in most cases, they will inevitably require judges to engage in "a degree of sympathetic 'gap-filling' or application of non-textual constitutional sources, in line with the actual text of the constitution".[45] Dixon further postulated that "[i]f judges start with a position that is directly hostile – or unsympathetic – to drafters' aims and understandings, there is also almost no chance that any form of specific constitutional language will be powerful enough to overcome this interpretive leaning".[46]

11 Some scholars have used the language of "deference" to analyse how courts engage with the constitutional text and the other branches of government. Jaclyn Neo explained "strong deference" as a scenario

40 Rosalind Dixon, "Constitutional Drafting and Distrust" (2015) 13 *International Journal of Constitutional Law* 819 at 820.
41 Rosalind Dixon, "Constitutional Drafting and Distrust" (2015) 13 *International Journal of Constitutional Law* 819 at 820.
42 Constitution of the Republic of Singapore (1999 Reprint).
43 Rosalind Dixon, "Constitutional Drafting and Distrust" (2015) 13 *International Journal of Constitutional Law* 819 at 823.
44 Rosalind Dixon, "Constitutional Drafting and Distrust" (2015) 13 *International Journal of Constitutional Law* 819 at 834.
45 Rosalind Dixon, "Constitutional Drafting and Distrust" (2015) 13 *International Journal of Constitutional Law* 819 at 834–835 (referring to Vicki C Jackson & Jamal Greene, "Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?" in *Comparative Constitutional Law* (Tom Ginsburg & Rosalind Dixon eds) (Edward Elgar Publishing, 2011) at p 599.
46 Rosalind Dixon, "Constitutional Drafting and Distrust" (2015) 13 *International Journal of Constitutional Law* 819 at 836.

"where the court *suspends judgment* in favour of another branch of government as well as where it *adopts the judgment* of another branch as to the relative weight of state or public goals vis-à-vis the implicated constitutional right(s)" [emphasis in original].[47] It would appear that Singapore courts have generally exhibited strong deference to Parliament when interpreting the constitutional guarantee of freedom of speech under Art 14 of the Singapore Constitution.[48] Neo posited that "[b]alancing evokes the idea of active judging, whereas deference, especially in the strong sense … suggests some judicial passivity".[49] Other scholars have commented that the Singapore courts currently appear averse to taking a proportionality approach in constitutional adjudication.[50] However, "deference" is not necessarily undesirable in a small country like Singapore where a well-functioning and accountable government with an impressive track record of delivering social and economic progress might be better placed than the Judiciary to decide what is best for Singapore society. The real issue perhaps is not whether there should be any deference but how much deference is appropriate.

12 Fidelity to a written constitution is of fundamental importance.[51] Fidelity to the text is inextricably connected to institutional legitimacy of the Judiciary. Fidelity requires that "we do our best to respect the text's allocation of freedom and constraint for future constitutional construction, and thus its particular allocation of trust and distrust with respect to later generations".[52] If the highest appellate court in any modern democracy were to ignore the text of the written

47 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 163.

48 *Eg*, *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR(R) 445 at [20]; *Chee Siok Chin v Minister of Home Affairs* [2006] 1 SLR(R) 582 at [42]–[52]. One may arguably perceive a weaker form of deference in the judicial review of other constitutional rights where the text of the Singapore Constitution is more ambiguous, for instance, whether the Prime Minister's discretionary powers to call for a by-election when a parliamentary seat falls vacant may be limited on the basis of the rule of law: see, *eg*, *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [87]–[92].

49 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 163.

50 *Eg*, Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 276.

51 V K Rajah, "Interpreting the Singapore Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 24–27. The former Attorney-General also noted: "[b]ut fidelity to the constitutional text does not stop at giving effect to the literal meaning of the text. Sometimes value judgments have to be made in interpreting and applying the Constitution": "Interpreting the Singapore Constitution" at p 24.

52 Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) at p 46.

constitution, it would risk losing public confidence in the fair and impartial administration of justice, and be perceived as actively engaging in bipartisan politics and an aggrandisement of political power.[53] In a recent case concerning judicial review of whether legislation prohibiting indirect campaign contributions violated the constitutional freedom of political communication, the High Court of Australia cautioned: "[i]n a system operating according to a separation of powers, judicial restraint should be understood to require no more than that the courts undertake their role without intruding into that of the legislature".[54] Indeed, as Neo noted, "[o]ne might see balancing as facilitating courts' engagement in a slightly more robust form of judicial review while at the same time cautiously guarding against charges of judicial activism".[55]

13 At the same time, it is highly unlikely that the drafters intended the meaning of the constitution text to be frozen at the time of its adoption. As the former Attorney-General V K Rajah concurred, "[c]oncepts like equal protection and free speech may have a clear general meaning, but their application to specific facts require exposition and value judgments".[56] The idea of a living constitution that adapts to changing times and conditions is not a new one.[57] In advocating a theory of "living constitutionalism" and "framework originalism" approach to constitutional construction, Jack Balkin made a persuasive argument of how fidelity to a plan for self-government built on a written legal framework that continues over time can be compatible with both history and democratic legitimacy:[58]

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53 This has been described as the "counter-majoritarian difficulty". For instance, it has been said that "judicial review is a counter-majoritarian force in our system … [W]hen the Supreme Court declares unconstitutional a legislative act, it thwarts the will of the representatives of the actual people of the here and now": Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 2nd Ed, 1986) at pp 16–17.

54 *McCloy v New South Wales* (2015) 257 CLR 178 at [77].

55 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 175; see also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007) at p 222: "[w]hat has been loosely termed 'judicial activism' has evolved beyond the existing conventions … A new political order – juristocracy – has been rapidly establishing itself throughout the world".

56 V K Rajah, "Interpreting the Singapore Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 24.

57 For an excellent analysis, see Vicki C Jackson, "Constitutions as 'Living Trees'? Comparative Constitutional Law and Interpretive Metaphors" (2006) 75 Fordham L Rev 921.

58 Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) at p 46.

> When we engage in this inquiry, we *are* interested in … the expectations and intentions that adopters had about their choice of linguistic technologies of freedom and constraint; we are interested in the economy of trust and distrust they created through their choice of publicly available language … [emphasis added]

The reason that one should be interested in these expectations and intentions is that they help us understand the nature of the social compact that the citizens of a particular democratic state, in the present, have accepted as their own.

14 This approach not only has "the advantage of describing the actual history of our nation"[59] but also explain "how constitutional construction occurs in response to constitutional politics", taking into account the "work of the political branches, courts, political parties, social movements, interest groups, and individual citizens".[60] While this article does not seek to interrogate how literalism, originalism, progressivism and other constitutional interpretive methodologies may be reconciled (if at all), it suffices to note that *all* interpretive methodologies are presently being used by different judges sitting on the highest appellate constitutional courts in most modern democracies.[61]

15 For the purpose of this article, what is interesting is Neo's reference to the "principle of legality" as an aspect of the rule of law in a persuasive attempt to justify a more active approach to constitutional adjudication. In an extrajudicial address in 2010, former Chief Justice Chan Sek Keong postulated that "[t]he basic principle in constitutional and administrative law review is the 'principle of legality'" which requires the Government to act in accordance with the law, that is, all legislative and executive acts must conform to the Singapore Constitution, and administrative decisions must also conform with the written law and rules of natural justice.[62] In *Yong Vui Kong v Public Prosecutor*, Chief Justice Sundaresh Menon, writing for a unanimous court emphasised: "a court operating in a parliamentary democracy is bound to implement the will of Parliament as embodied in domestic

59 Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) at p 278.

60 Jack M Balkin, *Living Originalism* (Harvard University Press, 2011) at p 279.

61 For a more comprehensive analysis, see, *eg*, Richard H Fallon Jr, "How to Choose a Constitutional Theory" (1999) 87 Cal L Rev 535; Greg Craven, "Heresy as Orthodoxy: Were the Founders Progressivists?" (2003) 31(1) *Federal Law Review* 87; Jeffrey Goldsworthy, "Interpreting the Constitution in Its Second Century" (2000) 24(3) *Melbourne University Law Review* 677.

62 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 472 and 473, paras 8 and 9.

legislation, insofar as such legislation is not incompatible with the constitution".[63]

16 According to Neo, such an approach would suggest that balancing in constitutional adjudication is simply "an *aspect* of ensuring legality of legislative and executive action" [emphasis in original] according to the text of the Singapore Constitution, and this emphasis on legality diverts attention away from "the fundamentality of rights [that] presumably pre-empts any objection that balancing is a form of judicial intrusion into the legislative domain".[64] In essence:[65]

> By hinging judicial balancing on the rule of law, judges may argue that the exercise only focuses on legality according to the Constitution rather than on purposes with which legislators are concerned such as maximising social welfare or voters' interests. The principle of legality not only legitimates judicial balancing but also distinguishes the judicial exercise from the legislative one …

17 This perspective is an interesting one, especially when Neo situated it in the context of a "constitutional dialogue" between the courts as a co-equal branch of government and the legislative and executive branches.[66] Kent Roach also commented that "under a dialogic approach, the dilemma of judicial activism in a democracy diminishes perhaps to the point of evaporation".[67] Perhaps a legal realist would be less enamoured of this romantic notion. An invocation of the principle of legality in constitutional rights adjudication only lends a temporary and illusory veneer to a façade of unassailable legitimacy; once the courts depart from the strictures of the text of the constitution to perform balancing acts *perceived* to be counter-majoritarian, the judicial branch will be accused of exercising unchecked political power as the

63 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [33]. The Court of Appeal has also expressed on a number of occasions that certain fundamental rules of natural justice within the rule of law may operate to "invalidate legislation on the ground of unconstitutionality": *Prabagaran a/l Srivijayan v Public Prosecutor* [2017] 1 SLR 173 at [84]; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [103]–[105].

64 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 176.

65 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 176.

66 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at pp 177–178. On the notion of a "dialogic judicial review", see also Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015) at pp 22–30.

67 Kent Roach, "Constitutional and Common Law Dialogues between Supreme Court and Canadian Legislatures" (2001) 80 *Canadian Bar Review* 481 at 532.

superordinate branch in government. Hence, when interpreting fundamental rights and liberties guaranteed by the constitution, courts are constantly walking the tightrope between, on the one hand, being faithful to the literal text and the aims and understandings of the drafters when these ideals were put into words, and on the other hand, being attuned to the legitimacy of the Judiciary as it construes the text in light of evolving community values, interests and expectations.

III. The performance begins: Choosing a theory and then the method

A. Australia and implied freedom of political communication

18 The Australian Constitution[68] is fundamentally different from the Singapore Constitution, but it operates in a manner that is similar to the Singapore Constitution in many respects: the constitution is the supreme law such that legislative and executive acts are subject to constitutional limitations, and the common law must also conform with the constitution. The Australian Constitution is generally regarded as "thin", that is, as an "instrument that merely provides for the structures of Australian government by establishing federal institutions and dividing powers between parts of the federation" rather than one that defines fundamental rights and liberties or values of the Australian polity.[69] The landmark judicial recognition in 1992 of an implied constitutional freedom of political communication,[70] based on its indispensability to the efficacious working of the system of representative democracy and responsible government provided by the Australian Constitution, suggests that political communication may have a broad ambit that can embrace the discussion of all matters of

68 Commonwealth of Australia Constitution Act 1900 (Australia).

69 Elisa Arcioni & Adrienne Stone, "The Small Brown Bird: Values and Aspirations in the Australian Constitution" (2016) 14 *International Journal of Constitutional Law* 60 at 60; see also Adrienne Stone & Simon Evans, "Australia: Freedom of Speech and Insult in the High Court of Australia" (2006) 4 *International Journal of Constitutional Law* 677 at 678; Leslie Zines AO, "The Common Law in Australia: Its Nature and Constitutional Significance" (2004) 32 *Federal Law Review* 337 at 352.

70 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; see also Hoong Phun Lee, "The Implied Freedom of Political Communication" in *Australian Constitutional Landmarks* (Hoong Phun Lee & George Winterton eds) (Cambridge University Press, 2003) at p 383 and Tom Campbell & Stephen Crilly, "The Implied Freedom of Political Communication, Twenty Years On" (2011) 30(1) *University of Queensland Law Journal* 59.

public affairs[71] and the "free flow of information and ideas bearing on Commonwealth, State and Territory government, government arrangements and institutions".[72] Wary of being accused of undemocratic judicial activism, Brennan CJ later explained:[73]

> Implications are not devised by the Judiciary; they exist in the text and structure of the *Constitution* and are revealed or uncovered by judicial exegesis. No implication can be drawn from the *Constitution* which is not based on the actual terms of the *Constitution*, or on its structure … [emphasis in original and references omitted]

19 A subsequent unanimous joint judgment of the Full Bench of the High Court of Australia in *Lange v Australian Broadcasting Corp*[74] ("*Lange*"), anchored the doctrine to *the necessary implications from the text and structure of the Constitution*,[75] and framed the freedom more narrowly as "freedom of communication between the people concerning political and government matters which enables the people to exercise a free and informed choice as electors".[76] In *Lange*, the court was concerned to demonstrate a fidelity to the text and structure of the Australian Constitution, emphasising that ss 7, 24, 64 and 128 of the Constitution, and related provisions, *necessarily imply* the concept of electoral choice as a constraint on the exercise of Commonwealth legislative and executive power.[77] Furthermore, the High Court has been observed to be "reticent about using the language of rights to describe [this] freedom",[78] and has in fact stated that "the freedom is not a personal right".[79] The court has repeatedly said that this Australian implication is negative in character, being a restriction on the exercise of legislative and executive power rather than a source of positive rights.[80] As Adrienne Stone correctly noted, in Australia, this freedom is "institutional" rather than personal in character, as it exists to protect the system of representative and responsible government as set out by

71 *Eg*, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 142; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 121–123.
72 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 217.
73 *McGinty v Western Australia* (1996) 186 CLR 140 at 168.
74 (1997) 189 CLR 520.
75 (1997) 189 CLR 520 at 559–560 and 566.
76 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 560. It is, however, not confined to election periods: at 561–562; see also *Levy v Victoria* (1997) 189 CLR 579 at 606.
77 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 560.
78 Adrienne Stone, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement" (2005) 27 *Sydney Law Review* 29 at 33.
79 *McCloy v New South Wales* (2015) 257 CLR 178 at [30].
80 *Eg*, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125–126; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 560, 567 and 575; *Levy v Victoria* (1997) 189 CLR 579 at 622; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 and 554; *McCloy v New South Wales* (2015) 257 CLR 178 at [29]–[30].

the text and structure of the Constitution.[81] Unlike an express freedom which entails textual constraints on judicial interpretation, an implied one accords a court significant room to manoeuvre. In the absence of a clear written provision that circumscribes the freedom of speech – such as Art 10 of the ECHR or Art 14 of the Singapore Constitution – it is unsurprising that the members of the High Court are unable to reach a consensus on the exact nature of a proportionality-based balancing that is applicable to Australia.[82] However in *Lange*, the court was at least able to agree on the *text* of the test that should be used to interrogate the validity of laws that restrict the freedom of political speech.

20 In *McCloy v New South Wales*[83] ("*McCloy*"), handed down in 2015, French CJ, Kiefel, Bell and Keane JJ, in a joint judgment, affirmed that "*Lange* is the authoritative statement of the test to be applied to determine if a law contravenes the freedom"[84] and held:[85]

> [T]he term 'proportionality' in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative or administrative acts are within the constitutional or legislative grant of power under which they purport to be done …

The *Lange* test, with minor subsequent modifications in *Coleman v Power*,[86] is essentially a two-stage test comprising three questions: (Stage 1 (Question 1)) – does the law effectively burden the implied constitutional freedom of political communication in its terms, operation of effect; (Stage 2 (Question 2)) – if the answer is yes, then are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?

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81 Adrienne Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication" (2001) 25 *Melbourne University Law Review* 374 at 375.

82 *Eg*, *McCloy v New South Wales* (2015) 257 CLR 178; *Tajjour v New South Wales* (2014) 254 CLR 508; *Monis v The Queen* (2013) 249 CLR 92.

83 (2015) 257 CLR 178.

84 *McCloy v New South Wales* (2015) 257 CLR 178 at [23].

85 *McCloy v New South Wales* (2015) 257 CLR 178 at [3]. The joint judgment also held that there are "three stages" to the third question, and these are "the inquiries as to whether the law is justified as suitable [as in having a rational connection to the purpose of the provision], necessary and adequate in its balance": at [2]. The High Court in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 noted that some judges favoured the expression "proportionality" while in some other cases other members of the court have expressed the test "as whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose": at 562. See Hoong Phun Lee, "The 'Reasonably Appropriate and Adapted' Test and the Implied Freedom of Political Communication" in *Law and Government in Australia* (Matthew Groves ed) (Federation Press, 2005) at p 59.

86 *Coleman v Power* (2004) 220 CLR 1 at [50]–[51], [77]–[78] and [82].

("compatibility test"); and (Stage 3 (Question 3)) if the answer is yes, then is the law reasonably appropriate and adapted to advance the legitimate object ("proportionality test")?[87] But the court hastened to add:[88]

> [A]cceptance of the utility of such criteria as tools to assist in the determination of the limits of legislative powers which burden the freedom does not involve a general acceptance of the applicability to the Australian constitutional context of similar criteria as applied in the courts of other jurisdictions. It does not involve acceptance of the application of proportionality analysis by other courts as methodologically correct …

21 The Australian free speech jurisprudence, premised on facilitating political communication in order to ensure that citizens are well-informed when it comes to exercising their right to vote, is instructive to Singapore. Even in the absence of an express free speech provision like Art 10 of the ECHR, the High Court of Australia held that it was necessary to find an implied constitutional freedom of communication in respect of government and political matters which accords an analogous but much narrower right to the press to report matters of public interest.[89] In fact, the High Court has stated that unlike the US Constitution, the Australian Constitution does *not* create rights of communication; the freedom protected is not freedom to communicate, but "a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each

87 It should be noted that in *McCloy v New South Wales* (2015) 257 CLR 178, while all members of the High Court agreed that some notion of "proportionality" might be relevant to the application of the *Lange* test, the justices were not unanimous that the second limb of the *Lange* test necessitates the consideration of "strict proportionality": *eg*, at [71]–[92], [138]–[152], [254]–[255] and [309]–[311]; see also *Monis v The Queen* (2013) 249 CLR 92 at 130 and 212 and *Tajjour v New South Wales* (2014) 254 CLR 508 at 574–581. In particular, Gageler J questioned: "[w]hy shouldn't the principled consideration which underlies a constitutional right or freedom, and the justification of its limitation, permeate the entirety of the analysis? … In the context of a constitutional freedom that arises only by implication … [t]he judgment to be made can never be divorced from the reasons why there is a judgment to be made": *McCloy* at [149].

88 *McCloy v New South Wales* (2015) 257 CLR 178 at [4]. The joint judgment explains that the "difference between the test of compatibility and proportionality testing [under the *Lange* approach] is that the latter is a tool of analysis for ascertaining the rationality and reasonableness of the legislative restriction, while the former is a rule derived from the *Constitution* itself": at [68].

89 In *ABC v Lenah Game Meats* (2001) 208 CLR 199, Kirby J also pointed out that the US First Amendment "has no counterpart in the Australian Constitution" and that analogous First Amendment principles have been rejected by both the Australian High Court and House of Lords; the public interest in free speech will not always trump individual interest: at 283 and 285.

other about political and government matters relevant to the system of representative and responsible government".[90]

22 In this regard, the participatory theory of democracy as propounded by Robert Post – one that is concerned with the enlightenment of public decision-making in a democracy through enabling public access to information and promoting public discourse – may be capable of offering a complementary theoretical framework for understanding the ambit of this newfound freedom in Australia.[91] An acceptance of the participatory theory has important implications for the continuing development of judicial approaches in resolving the tension between free speech values and other societal interests as it focuses on not an abstract notion of the quest for truth but on how the nature and content of speech can "ensure that the individual can effectively participate in and contribute to our republican system of self-government".[92] In a contemporary formulation, Post advanced the concept of "public discourse" – defined as "the forms of communication constitutionally deemed necessary for formation of public opinion"[93] – to convey the idea that the "necessary condition for democratic legitimacy" is seen in people "being free to participate in the formation of public opinion" and government being responsive to that opinion.[94]

23 The High Court in a unanimous and joint opinion framed the implied freedom narrowly: "that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia".[95] Framed in this manner, the court has essentially articulated a political metanarrative with the basis of freedom of speech fundamentally originating from its necessity in a

90 *Levy v Victoria* (1997) 189 CLR 579 at 622, *per* McHugh J, at 594, *per* Brennan CJ and at 641, *per* Kirby J.

91 *Eg*, Robert C Post, "Participatory Democracy and Free Speech" (2011) 97 Va L Rev 477; "Reconciling Theory and Doctrine in First Amendment Jurisprudence" (2000) 88 Cal L Rev 2353; see also Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd Ed, 2005) at pp 18–21; Ronald M Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) at pp 15–26. Rodney Smolla referred to this as the "democratic self-governance" rationale: Rodney A Smolla & Melville B Nimmer, *Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment* (3rd Ed, 2008) at para 2:28.

92 *Globe Newspaper Co v Superior Court* 457 US 596 at 604 (1982). See also Robert C Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence" (2000) 88 Cal L Rev 2353 at 2369. See also Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd Ed, 2005) at pp 48–49.

93 Robert C Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (Yale University Press, 2012) at p 15.

94 Robert C Post, "Understanding the First Amendment" (2012) 87 Wash L Rev 549 at 553.

95 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 571.

system of representative democracy and responsible government. As such, free speech may be properly circumscribed by other competing community interests and *yet* be given adequate breathing space to robust political debate and the communication of information about political and government matters consistent with democratic values.

24 In *McCloy*, while the members of the High Court disagreed on the exact definition of proportionality-based balancing, it was clear that "much of the United States judicial discourse regarding the First Amendment's right to free speech and what it necessitates by way of political freedom cannot be transposed to Australia's constitutional context".[96] Ultimately, it appears from the joint judgment in *Hogan v Hinch*, that the court will make a distinction between direct and indirect burdens on the freedom of political communication,[97] albeit there being an absence of unanimity as to whether different kinds of burden will attract different levels of judicial scrutiny. It seems that laws that impose a direct burden on political communication or content-based restriction will require greater legislative justification (hence closer judicial scrutiny) than laws that impose an indirect burden or a restriction based on the form or manner of communication.[98]

25 Thus, while one can distinguish the constitutional framework of Singapore from Australia, it is important to note that it is the "national democratic elections [that] provide the basis for the implication [in Australia]"[99] and as such, Singapore does share significant similarities with Australia in this regard. Moreover, the Singapore Constitution provides an express grant of a positive right to freedom of speech for the citizens of Singapore, which presents a stronger case for a more robust protection of such communications relevant to a system of representative government under Art 14 of the Singapore Constitution. In *Vellama d/o Marie Muthu v Attorney-General*, the Singapore Court of Appeal acknowledged that the Singapore Constitution establishes a representative democracy and that this could have legal consequences. The court emphasised:[100]

> [I]t is vital to remind ourselves that the form of government of the Republic of Singapore as reflected in the Constitution is the

96 *McCloy v New South Wales* (2015) 257 CLR 178 at [219].

97 *Hogan v Hinch* (2011) 243 CLR 506 at 555–556, *per* Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

98 *Eg*, *Levy v Victoria* (1997) 189 CLR 579 at 618–619; *Coleman v Power* (2004) 220 CLR 1 at 31; *Hogan v Hinch* (2011) 243 CLR 506 at 555–556; *McCloy v New South Wales* (2015) 257 CLR 178 at [152].

99 William G Buss, "Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication" (2006) 34 *Federal Law Review* 421 at 427.

100 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [79].

> Westminster model of government, with the party commanding the majority support in Parliament having the mandate to form the government. *The authority of the government emanates from the people. Each Member represents the people of the constituency who voted him into Parliament. The voters of a constituency are entitled to have a Member representing and speaking for them in Parliament.* The Member is not just the mouthpiece but the voice of the people of the constituency … [emphasis added]

Consequently, when interpreting Art 14 of the Singapore Constitution in the future, it is inevitable that the courts will have to revisit the implications for freedom of speech specifically for voters in Singapore when evaluating laws that curtail public discussion of how members of Parliament discharge their official functions.

B. Singapore and Art 14 of the Constitution

26 In Singapore, the Westminster-model legal system "is based on the supremacy of the Singapore Constitution, with the result that the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void".[101] The constitutional guarantee of freedom of speech is found in Art 14 of the Singapore Constitution, and it applies only to the *citizens* of Singapore.[102] The Article states, *inter alia*, that:

> **14.**—(1) Subject to clauses (2) and (3) —
>
> (*a*) every citizen of Singapore has the right to freedom of speech and expression;
>
> …
>
> (2) Parliament may by law impose —
>
> (*a*) on the rights conferred by clause (1)(*a*), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence …

The eight grounds upon which freedom of speech may be restricted have been "construed expansively, both in ministerial pronouncements

101 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [14]; see also *Public Prosecutor v Taw Chang Kong* [1998] 2 SLR(R) 489 at [89].

102 Constitution of the Republic of Singapore (1999 Reprint) Art 14.

and judicial interpretation".[103] Despite the presence of the supremacy clause,[104] in a consistent line of cases since the 1990s, the Singapore Court of Appeal has interpreted Art 14 of the Singapore Constitution with deference to "government's assessment of the needs of public order without requiring that the restrictions be informed by substantive standards of reasonableness, proportionality, or necessity within a democratic society".[105] The highly literal interpretations of constitutional provisions was observed to be typical of the decisions of the Court of Appeal exhibiting a reluctance to exercise constitutional judicial review in favour of the applicants.[106]

27 However, in *Review Publishing Co Ltd v Lee Hsieng Loong*[107] ("*Review Publishing*"), a case concerning a defamation claim by the Prime Minister of Singapore and other ministers against the Far Eastern Economic Review for an article that the plaintiffs argued had implied that they were unfit for office because they were corrupt and hence, had set out to sue and suppress those who would oppose them, the Court of Appeal had to consider whether the *Reynolds* privilege would be available to the foreign media defendants.[108] While the court held that the text of Art 14 of the Singapore Constitution left no doubt that constitutional freedom of speech was only available to *citizens* of Singapore, it, nonetheless, affirmed that freedom of speech – as it applies to citizens – had the status of a constitutional right and was of a higher-order status than common law rights.

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103 Thio Li-ann, "Singapore: Regulating Political Speech and the Commitment 'to Build a Democratic Society'" (2003) 1 *International Journal of Constitutional Law* 516 at 516.

104 Constitution of the Republic of Singapore (1999 Reprint) Art 4:"[t]his Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

105 Thio Li-ann, "Singapore: Regulating Political Speech and the Commitment 'to Build a Democratic Society'" (2003) 1 *International Journal of Constitutional Law* 516 at 516. See, *eg*, *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791; *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576; *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 2 SLR(R) 971; *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52. This may be contrasted with the more liberal approach of the Federal Court of Malaysia in recent years. *Eg*, *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 3 CLJ 507 at [3]: "the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted".

106 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 280–281.

107 [2010] 1 SLR 52.

108 For a comprehensive analysis, see David Tan, "The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore" [2011] Sing JLS 456.

28 The judicial deference to Parliament is, nonetheless, palpable. The Court of Appeal also acknowledged that Art 14(2)(*a*) of the Singapore Constitution "expressly provides that it is Parliament which has the *final say* on how the balance between constitutional free speech and protection of reputation should be struck".[109] This is the correct approach. As Jack Lee pointed out, a fundamental difference between Art 14(2) and analogous provisions in the ECHR and the Canadian Charter[110] is that "the former do not contain any words significantly qualifying the ability of the Singapore Parliament to restrict the fundamental liberties in question".[111] The text of Art 14(2) does introduce limited tests of necessity and expediency, but they do not operate as substantive constraints on Parliament's lawmaking powers to restrict the freedom of speech so long as the stated objectives fall into one of the categories articulated in Art 14(2). While some commentators[112] have urged a more liberal reading of Art 14(2) to allow some form of *substantive* judicial review – as opposed to a *procedural* review – it is difficult to see how Singapore courts can ignore the plain words of the constitutional text and invoke even the notion of the principle of legality to commence substantive review under Art 14(2). In *Chee Siok Chin v Minister for Home Affairs* [113] ("*Chee Siok Chin*"), the High Court compared Art 14(2) with Art 19(3) of the Indian Constitution[114] which permitted the state to impose "reasonable restrictions" on the right to assemble in the interests of the sovereignty and integrity of India or public order.[115] Similarly, the "terms and tenor" of Art 10(2) of the ECHR are "very different" from Art 14(2).[116] Indeed, courts giving effect to Art 10(2) can easily employ proportionality-based balancing since the text of Art 10(2) requires governmental restrictions of the freedom of expression to be "prescribed by law and are *necessary in a democratic society*" [emphasis added]. Under Art 14(2) of the Singapore Constitution, restrictions are constitutional so long as "*it* considers necessary or expedient" [emphasis added], with "it" unequivocally referring to Parliament.

109 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270].

110 Canadian Charter of Rights and Freedoms (Pt I of the Constitution Act 1982).

111 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 284.

112 *Eg*, Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 294; Michael Hor, "The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*" [1992] Sing JLS 542 at 544–549.

113 [2006] 1 SLR(R) 582.

114 Constitution of India (updated up to (One Hundredth Amendment) Act, 2015).

115 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [45].

116 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [86].

29 In the absence of a phrase equivalent to Art 19(3) of the Indian Constitution or Art 10(2) of the ECHR, the Court of Appeal correctly noted:[117]

> [T]here can be no questioning of whether the legislation is 'reasonable'. The court's sole task, when a constitutional challenge is advanced, is to ascertain whether an impugned law is within the purview of any of the permissible restrictions … All that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution …

Moreover, the court noted that the phrase "necessary or expedient" appearing in Art 14(2) conferred on Parliament "an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution" and that the "presumption of legislative constitutionality will not be lightly displaced".[118] Lee, however, argued that the *Chee Siok Chin* approach should not be followed, offering a number of reasons: (i) full effect should be given to the word "right", and if a "right" could be overridden simply by the Legislature enacting a restrictive measure, then it is more akin to a "privilege";[119] (ii) in the absence of some proportionality analysis, "the reservation of free speech, assembly and association rights to citizens is effectively meaningless, since citizens enjoy no greater rights than non-citizens in this respect";[120] (iii) it is the constitutional duty of courts to guard against "arbitrary and unlimited exercise of executive and legislative powers";[121] and (iv) the Federal Court of Malaysia declined to adopt a literal interpretation of "it deems necessary or expedient" and has read the word "reasonable" into Art 10(2) of the Federal Constitution of Malaysia – a clause that is virtually identical to Art 14(2) of the Singapore Constitution – thus permitting Parliament to impose only *reasonable restrictions*.[122]

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117 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [49].

118 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [49].

119 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 288 (referring to *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710).

120 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 290.

121 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 290–291.

122 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 291–294. In *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, the Court of Appeal first read a

(*cont'd on the next page*)

30 With respect, the Malaysian Court of Appeal did not fully articulate its reasons, and in particular address the counter-majoritarian objections, in its assertion of the so-called "doctrine of rational nexus" which allowed the Malaysian courts to strike down state action on the ground that it is disproportionate to the object sought to be achieved.[123] One is unlikely to disagree that "[p]rovisos or restrictions that limit or derogate from a guaranteed right must be read restrictively",[124] but when the Malaysian Constitution is plainly clear about which branch of government should be doing the balancing, the Judiciary must do more to explain *why* it is claiming the constitutional authority to wrest this power away from the Malaysian Parliament by reading additional words into the constitutional provision. It is pertinent that the High Court of Australia was concerned to preserve its institutional legitimacy over a period of 15 years after handing down its decision in 1992 which found an implied constitutional freedom of political communication thus giving the court the power to override the will of Parliament; it painstakingly reiterated that this implication was a narrow one and was tethered to the text and structure of the Australian Constitution as a result of, *inter alia*, the electorate's constitutional right to vote for members of the Senate and the House of Representatives.[125] In contrast, the Malaysian courts were more taciturn.

31 Lee's reading of *Review Publishing* that the Court of Appeal, in *obiter*, suggesting that freedom of speech can be regarded as a "preferential right" taking precedence over protection of reputation in certain circumstances is an optimistic one;[126] it is perhaps in such narrow scenarios that the freedom may have a *horizontal* application in respect of citizens of Singapore. But the court did not go so far as to treat freedom of speech as articulated in Art 14(2) of the Singapore Constitution as a fundamental right capable of trumping parliamentary supremacy. While the court appears open to considering some form of a broader qualified privilege akin to the *Reynolds* privilege in a future case involving a Singapore citizen-defendant,[127] it will ultimately defer to

requirement of "reasonableness" into Art 10(2) thus triggering a proportionality analysis to be conducted by the courts: at [9]. This approach was later affirmed by the Federal Court, Malaysia's highest appellate court: *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 33 at [5].

123 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at [8].

124 *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 33 at [5].

125 *Eg*, *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178.

126 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 289.

127 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [270]. The court noted that in a future case, it might be prepared to reconsider whether courts

(*cont'd on the next page*)

Parliament should legislation be passed to establish the appropriate form of qualified privilege to be applied in defamation claims. Neo pointed out that while the court did suggest that constitutional rights are usually conceptualised as preferential or fundamental, it "did not go so far as to accept that constitutional rights are 'preferential' or 'fundamental'";[128] indeed, the *vertical* application of the freedom of speech is severely constricted by the text of Art 14(2).

32 This judicial deference resonates with the purported communitarian ideology or neo-Confucian ethos of the Singapore system, which emphasises the community's interest in social cohesion and stability above individual rights and liberties.[129] Thio Li-ann recently coined the term "paternal democracy" as a useful framing device for understanding the distinctive brand of constitutional democracy practised in Singapore, one that is characterised by a governmental prescription of:[130]

> [P]olitical stability, combined with a legal environment that protected property rights and ensured commercial certainty … [and where economic prosperity] was to be achieved by discipline, rather than rambunctious democracy, and through curtailing an over-robust exercise of civil and political rights …

33 This democratic society envisaged is by no means identical to a Western liberal democratic model, but is shaped by a communitarian

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should "shift the existing balance between constitutional free speech and protection of reputation in favour of the former where the publication of matters of public interest is concerned": at [267]. However, "[p]roponents of change must produce evidence of a change in our political, social and cultural values in order to satisfy the court that change is necessary so as to provide greater protection … for defendants where the publication of matters of public interest is concerned": at [273].

128 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 173.

129 *Eg*, David Tan, "The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore" [2011] Sing JLS 456; Thio Li-ann, "Singapore: Regulating Political Speech and the Commitment to 'Build a Democratic Society'" (2003) 1 *International Journal of Constitutional Law* 516.

130 Thio Li-ann, "Between Apology and Apogee, Autochthony: The 'Rule of Law' beyond the Rules of Law in Singapore" [2012] Sing JLS 269 at 283. Thio also suggested that "'paternal democracy' captures the changing nature of the relationship between the Singapore government and the governed as reflected in the government's self-perception, institutional developments, the rules of engagement with respect to the conduct of public debate which are in flux": "Between Apology and Apogee, Autochthony: The 'Rule of Law' beyond the Rules of Law in Singapore" at 283.

ethos and the priority to ensure a system of "good government".[131] However, at the bare minimum, one should accept that:[132]

> At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy … This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions …

Consequently, the aims of good government and good governance as understood from a neo-Confucianist, communitarian perspective and the commitment to build a democratic society necessitates *minimally* a recognition and protection of the freedom of some political speech.

34 Neo proffered that the balancing metaphor in constitutional adjudication in Singapore has been employed as a "useful interpretive tool in an emerging dialogue with the legislature and the executive on constitutional meaning".[133] While no legislation in Singapore has been struck down as being unconstitutional by the courts, Neo postulated that "[i]n taking balancing seriously, later cases … suggest a shift from the asserted prioritisation of state interests towards giving rights, at least, co-equal status".[134] The present author takes a more charitable view of the Court of Appeal's interpretive methodologies in Art 14 of the Singapore Constitution's jurisprudence than that expressed by Yap Po Jen.[135] It appears that the court under the leadership of then Chan CJ has gone beyond the mere constitutional "fig leaves" of originalism and textualism, as evident in the court's lengthy discussion in *Review Publishing* on how the broader qualified privilege in the law of defamation may be argued for a Singapore citizen in the future, and it was important to show whether the contemporary political, social and cultural values in this country support such a development.[136] The

131 *Eg*, Han Fook Kwang, Warren Fernandez & Sumiko Tan, *Lee Kuan Yew: The Man and His Ideas* (Marshall Cavendish, 1998) at pp 380–383. It has also been emphasised on numerous occasions by Lee Kuan Yew that Singapore is built on a system of good government by *good* men: *Lee Kuan Yew: The Man and His Ideas* at pp 87–101.

132 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200.

133 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 160.

134 Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 171.

135 Yap Po Jen, "Uncovering Originalism and Textualism in Singapore" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 117.

136 *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [265]–[297].

judicial *dictum* was expressed in a manner not incompatible with Balkin's framework originalism-living constitutionalism approach. Constitutional interpretation in Singapore must be situated within the evolving context of a paternalistic democracy and a neo-Confucianist statist framework.[137] Gageler J of the High Court of Australia intimated that there is a "systemic risk" within the system of representative and responsible government established by the Australian Constitution that:[138]

> [C]ommunication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice …

Such observations resonate with the Singapore experience. It is this author's contention that the model of good government and good governance in Singapore[139] – reinforced in part by a commitment to build a democratic society, and in part by notions of Confucian communitarian ideology – necessitates *minimally* a recognition and protection of the freedom of speech that relates to communications pertaining to the conduct of the elected *junzi* and *gongyi*.[140]

IV. Conclusions – Spectacle of the balancing act

35 In his comprehensive critique of proportionality, Barak remarked that democracy is premised on "the co-existence of both majority rule and the rule of democratic values";[141] in both Western legal

137 This author has previously argued that freedom of speech can also be justified from this neo-Confucianist philosophy that the Singaporean government espouses. See generally David Tan, "The *Reynolds* Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication in Singapore" [2011] Sing JLS 456.

138 *McCloy v New South Wales* (2015) 257 CLR 178 at [115].

139 According to former Chief Justice Chan Sek Keong, "good government" refers to "pursuing good policies in building a modern successful society, and not in turning it into an economically or socially failed state", while "good governance" refers to "the institutional rules of procedure and decision-making processes of administrative bodies in implementing government policies in accordance with the law": Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 471–472.

140 David Tan, "Whither the Autochthonous Narrative of Freedom of Speech in Singapore?: A Guide to Defaming Politicians and Scandalising Judges in Singapore" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 217.

141 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) at p 253.

systems, it is essential for every constitutional democracy that the people be the ultimate sovereign, and that a democracy must recognise several fundamental principles such as separation of powers, the rule of law and independence of the Judiciary.[142] How important is it for a court to engage in some kind of proportionality-based balancing in constitutional adjudication? Does the audience demand the spectacle of a judicial balancing act? Or does the electorate prefer the judicial branch to demonstrate greater fidelity to the text and remain apolitical? The democratic systems of government in Australia and Singapore exhibit Diceyan qualities that are markedly different from the American system where there appears to be a deep distrust of government.

36 Proportionality and the concept of balancing are said to be "intimately connected but not coterminous".[143] The criticisms of balancing, and therefore proportionality (as it is one of the stages of balancing), have been well-canvassed, ranging from incommensurability to the devaluation of rights.[144] While Neo theorised about the balancing metaphor in the context of a constitutional dialogue, there is little prescription on how judges might legitimately conduct any balancing in respect of giving effect to freedom of speech Art 14 of the Singapore Constitution. On the other hand, Lee valiantly attempted to justify why Singapore courts should combine all four stages of a proportionality analysis in rights adjudication, which he saw as "already present in Singapore jurisprudence to varying degrees", into a "unified proportionality analysis when determining whether Parliament has a legitimate interest in restricting a particular fundamental liberty through legislation".[145] Unfortunately, the constitutional rights – whether viewed as fundamental, preferential or something else – are all phrased differently in Part IV[146] of the Singapore Constitution titled "Fundamental Liberties", thus indicating that the permissible judicial scrutiny accorded to each constitutional right must necessarily be calibrated according to the text of each constitutional provision. Perhaps a proportionality-based balancing approach may be apropos to another constitutional provision, but it is this author's view that the

142 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) at p 252.

143 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 295.

144 *Eg*, Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002); David M Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

145 Jack Tsen-Ta Lee, "According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276 at 302.

146 Constitution of the Republic of Singapore (1999 Reprint) Arts 9–16.

unambiguous language of Art 14 of the Singapore Constitution does not give the Singapore courts much leeway in judicial review of an Act of Parliament that restricts the freedom of speech beyond a rational relation scrutiny. To require the courts to do so would be tantamount to asking them to perform a magic act, not a balancing act.

37 Indeed, there is no real consensus on *who* should be doing the balancing. In a stinging critique of proportionality-based *ad hoc* balancing, Jochen von Bernstorff argued that the structure of certain constitutional rights necessitates some judicial deference:[147]

> Once a court comes to the conclusion that the measure and ends are rationally connected and no severe limitation of individual liberties is at stake, it should show a high degree of deference vis à vis parliamentary legislation in order to avoid the counter-majoritarian catch. Ad hoc balancing, unlike suitability and necessity, undermines such deference …

38 As Thio astutely pointed out, the "principled pragmatism" that characterises the judicial approach of the "third wave" Singapore bench results in a deference to the political branches "less a matter of subservience and more one of respect for the institutional relationships, the superior qualities of other decision-makers or for prudential reasons".[148] But deference should not be equated with dereliction. In *Tan Seet Eng v Attorney-General*,[149] Menon CJ declared the competency of the Singapore courts to adjudicate on the legality of the exercise of Ministerial discretion, despite the nature of policy-centric *executive* decision-making: "[The Executive] are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge".[150] Unfettered executive discretion is undoubtedly against the rule of law.

147 Jochen von Bernstorff, "Proportionality without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination" in *Reasoning Rights: Comparative Judicial Engagement* (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds) (Hart Publishing, 2016) at p 82.

148 Thio Li-ann, "Principled Pragmatism and the 'Third Wave' of Communitarian Judicial Review in Singapore" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) 75 at p 103.

149 [2016] 1 SLR 779.

150 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [97] (citing *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644, *per* Lord Diplock). The court may review such executive actions on limited grounds such as "illegality, irrationality, and procedural impropriety": at [99].

Indeed, "[a]ll power has legal limits and it is within the province of the courts to determine whether those limits have been exceeded".[151]

39 However, parliamentary decision-making is a different thing. In a democracy like Singapore where the Constitution reigns supreme,[152] the courts must refer to the text of the Constitution and conduct their own *institutional balancing* exercise first, to answer the question whether a particular Act of Parliament falls "comfortably within the proper sphere of judicial inquiry".[153] Menon CJ explained that deference and non-justiciability are both based on concerns about the institutional limits of the judicial role when compared to the competence, expertise and democratic legitimacy of the legislative and executive branches of government, but there is a significant difference. His Honour observed:[154]

> [T]he doctrine of non-justiciability … 'insulates' certain types of governmental action from judicial review. It declares that those actions are inherently unreviewable. Thus, when the courts decline to make their own assessment of the issue, they are deciding that an issue is non-justiciable. Deference, on the other hand, is a more flexible doctrine which is not antithetical to judicial scrutiny. *There are degrees of deference and establishing the appropriate degree is a matter of balancing all the relevant factors in the individual case. Rather than being a blanket rule preventing scrutiny, deference maintains some flexibility by requiring the courts to assess their institutional competence to deal with a particular issue, and to show restraint to the extent that their competence is limited.* [emphasis added]

If, after this first stage, courts find that they have the institutional competence to decide on the particular issue before them, they can then move on to the second inquiry of the *legality* of the legislation, which may invite some form of *proportionality-based balancing*. There is much to glean from the joint judgment of the High Court of Australia in *McCloy*, which sensibly cautioned:[155]

> [I]t is not to be expected that each jurisdiction will approach and apply proportionality in the same way, but rather by reference to its constitutional setting and its historical and institutional background. This reinforces the characterisation of proportionality as an analytical tool rather than as a doctrine …

151 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [98].
152 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [99].
153 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [103].
154 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105] (citing Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 *Law Quarterly Review* 222 at 241).
155 *McCloy v New South Wales* (2015) 257 CLR 178 at [72].

40 Three decades ago, Alexander Aleinikoff bemoaned that "[c]onstitutional law is suffering in the age of balancing. It is time to begin the search for new liberating metaphors".[156] In constitutional rights adjudication, judges do more than balance between competing rights and interests. Any judge, invariably, has to perform a number of tasks at the same time, such as articulating a general political theory or national metanarrative of his state, deciding which branch of government possesses the most appropriate institutional competence to conduct the balancing in question, choosing the best interpretive methodology when construing a particular constitutional guarantee, preserving internal coherence of the constitution and maintaining public confidence in the administration of justice. Perhaps "juggling" would be a more fitting metaphor.

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156 T Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943 at 1005.