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ESSAY

SCHAUER'S FREE SPEECH COMPARATIVISM

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INTRODUCTION

It is a great honour to make this contribution about Frederick Schauer. I am especially pleased that I can give voice to the many Australian scholars who had the pleasure of meeting and working with him and those who were influenced by his work.

Fred was a frequent visitor to Australia, where he was well known and widely admired. I first came across him at the Australian National University in the late 1990s at the beginning of my career. It will surprise no one to know that he was memorably generous and straightforward. He had a way of being kind to junior scholars that consisted simply in taking them seriously. Years later, I invited him to co-teach a freedom of speech seminar with me at Melbourne Law School, and after to join me as an editor of *Oxford Handbook of Freedom of Speech* (2021) together. Both experiences were career highlights.

For the purposes of this tribute, I want to offer a reflection on two of the most important essays he wrote on freedom of speech for a

* Melbourne Laureate Professor, Melbourne Law School, University of Melbourne. Part I and Section II.A of this Essay draw upon an unpublished paper for discussion at the VII World Congress of the International Association of Constitutional Law, Athens that I co-authored with Simon Evans, Balancing and Proportionality: A Distinctive Ethic (April 28, 2007) (unpublished manuscript) (on file with author). My thanks to Professor Evans for his collaboration.

comparative audience: *The Exceptional First Amendment*[1] and *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*.[2] Both were published in 2005 and offer a prediction on the development of freedom of expression in the United States and elsewhere that is worth revisiting after twenty years.

In the first piece, Schauer revisited the well-known claim that First Amendment law is exceptional for the strong protection it provides to freedom of speech. Even in this well-travelled field, Schauer offered an insightfully detailed account, swiftly moving through a range of ideas, well beyond the conventional account. But perhaps the most important idea in the essay lies in introduction of a second dimension: "methodological exceptionalism."[3] American free speech adjudication is characterised by "a formal and sharply demarcated two-step process" and other rule-like doctrines.[4] By contrast, in most other constitutional democracies the inquiry is a "less formal and more open-ended question of whether a restriction is reasonable, necessary in a democratic society, or, most commonly, proportional in light of the importance of the restriction and the extent of the free expression interest that is restricted."[5]

The second essay developed the argument advanced in the first, but it went further to draw firm links between American substantive and methodological exceptionalism. The argument in this essay goes somewhat against the grain of the first, concluding that the "rulified" nature of First Amendment law, because of its deep roots in American constitutional culture, was unlikely to change.[6]

Before going on to consider their arguments in more detail, let me pause to reflect on how they illustrate some of the distinctive virtues of Fred Schauer's scholarship. They combine an eye for doctrinal detail, powerful jurisprudential insights about the relationship between doctrinal structures and their underlying reasons, and a deep appreciation of the significance of legal and political culture.

[1] Frederick Schauer, The Exceptional First Amendment, *in* American Exceptionalism and Human Rights 29 (Michael Ignatieff ed., 2005).

[2] Frederick Schauer, Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture, *in* European and US Constitutionalism 49 (Georg Nolte ed., 2005).

[3] Schauer, supra note 1, at 53.

[4] Id.

[5] Id. at 53–54.

[6] See Schauer, supra note 2, at 63–67.

For the remainder of this Essay, I will turn to consider how Schauer developed his claims about method and substance in free speech cases and examine his claims with a comparative analysis of two jurisdictions which allow some testing of Schauer's claims and predictions.

I. SCHAUER'S FREE SPEECH COMPARATIVISM

A. The Exceptional First Amendment and the Convergence Thesis

Let me start with *The Exceptional First Amendment*. In this essay, Schauer's focus is on the possible *convergence* between American rulified approaches to free speech law[7] and the more open-ended balancing approaches—typically in the form of proportionality tests—that dominate elsewhere.[8]

This argument builds upon an earlier article that is not specific to the free speech context, but theorizes about rules more generally,[9] which in turn builds upon his enormous body of work on these questions.[10] In that article, Schauer proposes that although there is a difference between rules and standards, "the adaptive behaviour of rule-interpreters and rule-

[7] Schauer's well-known account of rules is clearly explained by Kathleen Sullivan. A "rule" binds a decision-maker to respond in a determinate way to the presence of specified triggering facts. Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 58 (1992). A rule is based on some kind of background justification, but a distinguishing feature of a rule is that it will apply even where its application might be contrary to that background justification. Id. By contrast, a "standard" seeks to apply the background justification or policy directly to a fact situation. Id. at 58–59. Standards allow the decision-maker more discretion because they encourage considering all the relevant factors in a particular case. Id. For Schauer's account, see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 23 (1991) (outlining the "factual predicate" and "consequent" of a rule). The description of First Amendment law as "rulified" should not be overstated. Rules and standards exist along a spectrum, and many of the "rules" that characterise First Amendment law have some standard-like features. They may incorporate general or vague concepts that allow for considerable discretion at the point of application. Nonetheless, First Amendment law remains unusual for its reliance on relatively rigid and rule-like doctrines. See supra notes 4–5 and accompanying text. On the difference between the categorical or conceptual structure of First Amendment law and other systems of freedom of speech, see Adrienne Stone, The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication, 23 Melb. U. L. Rev. 668, 685–89 (1999).

[8] See Iddo Porat, Proportionality, *in* Max Planck Encyclopedia of Comparative Constitutional Law ¶¶ 19–42 (2018).

[9] See Frederick Schauer, The Convergence of Rules and Standards, 2003 N.Z. L. Rev. 303, 305.

[10] For Schauer's most systematic account of rules, see generally Schauer, supra note 7.

enforcers will push rules towards standards, and push standards towards rules."[11] More fully, he argues:

> When authorised to act in accordance with rules, rule-subjects will tend to convert rules into standards by employing a battery of rule-avoiding devices that serve to soften the hard edges of rules. . . .
>
> Conversely, the adaptive behaviour of rule-subjects when given a standard goes in the opposite direction. These rule-subjects, when given few rules in the rules-standards sense, will make them themselves, and apply them to their own allegedly discretionary behaviour, thus limiting significantly the case-sensitive discretion that it was the intention of the rule-maker to grant.[12]

In this way, "gravitation towards the same degree of ruleness (or standardness, if you will), regardless of the starting point, will occur, and that convergence will produce a world in which the choice between rules and standards makes far less difference than is generally believed to be the case."[13]

In light of this general account of the relationship between rules and standards, Schauer is sceptical that the methodological dimension of American free speech exceptionalism is an enduring phenomenon. In short, his view (in 2005) was that the experience of free speech adjudication outside the United States is simply too short, and the cases too few, to allow this conclusion. On the contrary, there is a real chance that the rules-based American approach and the more standard-like approaches elsewhere will ultimately converge and that the preference for balancing approaches seen in jurisdictions outside of the United States might be a reflection of their relative youth.

B. The Divergence Thesis? Linking Substantive and Methodological Preferences

The *Comparative Constitutional Architecture* essay, on the other hand, strikes a different note, turning from a general account of rules and standards to questions of the operation of rules and standards in particular legal and constitutional cultures. On this account, Schauer ties preferences in doctrine to deeper choices in constitutional culture:

[11] Schauer, supra note 9, at 305.
[12] Id. at 312.
[13] Id. at 319 (footnote omitted).

"[D]ifferent architectures emerge from different substantive commitments, different experiences, and different views about the locus of decision-making authority."[14]

With respect to the United States in particular, he argues that the American distrust of balancing derives from "a culture of extreme distrust" that encompasses "distrust of discretion and . . . a fear of the official ability to assess accurately the dangers that might come from speaking, writing and printing."[15] He continues, "[I]n such a culture, strong protection of free speech goes hand in hand with distrust of structures that allow, encourage or even require a weighing of interests."[16]

This distrust is compounded by the continuing debate about the legitimacy of judicial review in the United States given its "textually and historically fragile provenance"[17] and the fact that balancing is also often seen as incompatible with the guidance function that the Supreme Court must perform—a function that is particularly salient given the minuscule fraction of the cases presented to it that it can give substantive attention.[18]

It follows from Schauer's argument that American free speech law is *not* likely to move significantly away from its current rule structure. Rather, that structure is embedded in, and supported by, cultural and institutional features.

II. PROPORTIONALITY: TRANSITION OR RESISTANCE TO RULES?

Now with the hindsight of a further twenty years, how do these two forms of argument about convergence and divergence look? In short, the answer is that the second form of the argument, that links questions of substance and method, prevails.

With respect to Schauer's most specific prediction about American free speech law, First Amendment law has not moved significantly from its rulified structure. Exceptions to First Amendment protection continue to be expressed in doctrinal forms that have a relatively rule-like structure.[19]

[14] Schauer, supra note 2, at 57.
[15] Id. at 63–64.
[16] Id. at 64.
[17] Id. at 64–65.
[18] Id. at 66.
[19] For recent examples, see 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2307–08, 2310–13 (2023) (treating the question of whether a website designer would be required under the Colorado Anti-Discrimination Act to create websites celebrating same-sex marriage as an instance of "compelled speech" attracting strict scrutiny); Free Speech Coal., Inc. v. Paxton, 145 S. Ct. 2291, 2300, 2306 (2025) (treating the validity of a Texas law requiring that certain

More specifically, the Court continues to insist that only narrow categories of expression escape full First Amendment protection.[20] The presumptive invalidity of content-based laws under strict scrutiny remains, and rare cases in which content-based laws survive tend to be treated as new "low-value" categories rather than a "softening" of strict scrutiny.[21] Far from any convergence on a more standard-like doctrinal form, the rigidity of First Amendment doctrinal structures have maintained First Amendment's substantive exceptionalism. Indeed, buttressed by the exacting nature of its doctrine, First Amendment law has, if anything, become ever more protective: expansionist if not absolutist in its protection of speech. [22]

Equally, examining jurisdictions outside the United States—specifically Canada and Australia—reveals that they have not moved significantly in the direction of the US. Rather, for reasons of their legal context and political culture, they have resisted rulification, though in quite different ways as between them.

A. Canada

Let me begin with Canadian law of freedom of expression and specifically with the proportionality test established by the Canadian Supreme Court in *R. v. Oakes*.[23] As is well known, the Court established a three-stage standard of review for determining challenges brought under the *Canadian Charter of Rights and Freedoms* ("*Charter*") that assesses:

websites publishing sexually explicit content verify that visitors are 18 years or older as triggering intermediate scrutiny).

[20] See United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011); McCutcheon v. FEC, 572 U.S. 185, 191–93, 197 (2014).

[21] For instance, the Court's finding in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8–9, 40 (2010), that a federal law could validly prohibit the provision of material assistance (including "training" and "expert advice or assistance") to a terrorist organisation, is treated by Chemerinsky as a category of "unprotected and less protected speech." Erwin Chemerinsky, Constitutional Law: Principles and Policies §11.3, at 1095 (7th ed. 2023).

[22] See Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1216–19 (2015); Zachary S. Price, Our Imperiled Absolutist First Amendment, 20 J. Const. L. 817, 824 (2018).

[23] [1986] 1 S.C.R. 103, 138–40 (Can.). The *Oakes* test is used to implement Section 1 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), which provides that *Charter* rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

> (1) whether the challenged law serves the end it purports to serve (the rational connection element);
>
> (2) the availability of alternative, less drastic means by which that same end could be achieved (the minimal impairment or narrow tailoring element); and
>
> (3) whether the end pursued by that law is worth the restriction or costs imposed (the balancing element).[24]

This test, derived from the jurisprudence of the German Constitutional Court[25] (itself derived from 19th-century German administrative law) and widely adopted throughout the world,[26] is usually understood to entail a flexible form of analysis that pays close attention to the particular legal and factual circumstances at hand.[27]

This form of analysis *could* in principle be deployed in ways that are quite rule-like. Indeed, U.S.-style strict scrutiny analysis bears some conceptual similarity to proportionality analysis, as both require a test of the relationship between ends and means. Strict scrutiny undertakes this task in a more rigid and rule-like way that at least reduces—and perhaps even eliminates—the judge's capacity to "balance" in the individual case.[28] Moreover, the history of the proportionality test in Canada demonstrates exactly this possibility. For a period in the 1980s and 1990s, the Supreme Court of Canada began to develop more specific forms of the test. For instance, differentiated forms of the test were developed according to the Court's assessment of the relative institutional strengths of the courts and the Parliament in particular policy areas.[29] Thus, the Court indicated it would scrutinize the availability of alternative means more closely in relation to criminal justice, given the competence of the

[24] *Oakes*, 1 S.C.R. at 139.

[25] Robert Alexy, A Theory of Constitutional Rights, at xvii, 66–67 (Julian Rivers trans., 2002).

[26] See Porat, supra note 8, at ¶¶ 13–17. On proportionality in supranational contexts, see Yutaka Arai-Takahashi, Proportionality, *in* The Oxford Handbook of International Human Rights Law 446, 450–52 (Dinah Shelton ed., 2013).

[27] See Stone, supra note 7, at 689; Adrienne Stone, Proportionality and Its Alternatives, 48 Fed. L. Rev. 123, 138 (2020).

[28] Hence the description "'strict' in theory and fatal in fact." Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

[29] See Sujit Choudhry, So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian *Charter*'s Section 1, 34 Sup. Ct. L. Rev. 501, 511–12 (2006).

Court in this area,[30] whereas the Court showed more deference with respect to labor relations[31] and commercial regulation.[32]

However, even in the early 2000s when Schauer wrote these essays, the Supreme Court of Canada had shown considerable resistance to the rulification of proportionality analysis and consistently emphasized the importance of context. In *Thomson Newspapers Co. v. Canada (Attorney General)*, the Court stressed the significance of context in each application of section 1 of the *Charter*:

> In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.[33]

The focus on context remains at the core of section 1 analysis under the *Charter*, and the Court's analysis of the guarantee of freedom of expression is still dominated by the analytical framework outlined in *Oakes*. In the Canadian context, attention to the question of "minimal impairment" (i.e., the availability of alternative, less restrictive means) has assumed particular significance and requires detailed consideration of the factual context, including possible alternative laws.[34]

That is not to say that there is no recognition that certain categories of cases might merit particular approaches. On the contrary, the Court has indicated that for expression close to the "core" of the *Charter*'s protection (political expression for instance), scrutiny will be more exacting, whereas there are recognised kinds of "low-value" expression (hate speech for instance) which might more readily be limited.[35] But

[30] See Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927, 994 (Can.).

[31] See R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 795–96 (Can.).

[32] McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229, 318 (Can.); R. v. Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209, para. 257 (Can.).

[33] [1998] 1 S.C.R. 877, para. 87 (Can.). For similar statements, see R. v. Sharpe, [2001] 1 S.C.R. 45, para. 155 (Can.); see also Richard Moon, Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights, 40 Osgoode Hall L.J. 337, 351 (2002) (noting criticism of the development of the *Oakes* test as excessively deferential).

[34] See Moon, supra note 33, at 346; Dieter Grimm, Proportionality in Canadian and German Constitutional Jurisprudence, 57 U. Toro. L.J. 383, 389 (2007); Niels Petersen, Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa 106 (2017).

[35] E.g., Saskatchewan (Hum. Rts. Comm'n) v. Whatcott, [2013] 1 S.C.R. 467, paras. 112, 115 (Can.). For a very recent instance in a closely analogous context, see Ontario (Att'y Gen.)

crucially, the recognition of these categories does not displace proportionality testing, and the degree of additional scrutiny entailed is not precisely defined.

As with the United States, the most convincing reasons for this trajectory lie in Canada's constitutional culture.[36] There may be other factors of course: the text of the *Charter* could be seen as inviting this type of analysis,[37] and the comparative openness of the Canadian Supreme Court to the influence of foreign law explains why it is proportionality rather than some other form of doctrinal flexibility that has prevailed in the Canadian Courts. Two other factors, however, stand out that go to the heart of Canada's constitutional culture.

1. Proportionality and Dialogue

The first lies in Canadian understandings of judicial review. It is conceptualised and justified as involving interinstitutional dialogue between courts and parliaments, with parliaments usually able to respond to judicial review by amending, modifying, or reenacting the law or, in rarer cases, with the judicial override mechanism permitted under section 33 of the *Charter*.[38] Proportionality-based review may be a better fit for a constitutional order committed to this form of dialogue than more rulified forms of constitutional doctrine.

v. Working Fams. Coal. (Can.) Inc., 2025 SCC 5, para. 118 (Can.) (considering campaign funding and the right to vote under Section 3 of the *Charter*).

[36] See generally Adrienne Stone, Canadian Constitutional Law of Freedom of Expression, *in* Canada in the World: Comparative Perspectives on the Canadian Constitution 245 (Richard Albert & David R. Cameron eds., 2018) (linking the Canadian preference for flexible and context-sensitive proportionality to aspects of Canadian constitutional culture, including the Canadian commitment to facilitating interinstitutional dialogue).

[37] Section 1 of the *Charter* provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). Section 1 thus calls for a judgment, it might be said, as to whether any law is a proportionate restriction of the protected rights. See Comm. for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, 152 (Can.). The First Amendment, by contrast, contains no such explicit external limitation of protected rights. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[38] See Peter W. Hogg & Allison A. Bushell, The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All), 35 Osgoode Hall L.J. 75, 96–98 (1997); Rosalind Dixon, The Supreme Court of Canada, *Charter* Dialogue, and Deference, 47 Osgoode Hall L.J. 235, 247–51 (2009).

The central aim of a dialogue model is to enable the legislature to respond to a judicial determination. Proportionality analysis contributes to the capacity for dialogue by allowing the parliament to respond with a law that more effectively pursues its objective or does so in a manner that is more narrowly tailored towards that objective. Or, it is open for the legislature to attempt to reset the balance by reducing the impact of the impugned law on the protected right or drafting the law in a manner that identifies and pursues a weightier objective.[39]

The proportionality test will, of course, be most effective in encouraging dialogue when it is applied to preclude as little as possible, at least in the first instance. For that reason, a commitment to dialogue encourages the use of the proportionality test in a manner that is fact specific, resolving the case on matters particular to the legislation challenged and making as few determinations as possible on the nature of possible alternative formulations.

2. Proportionality and Political Culture

Second, proportionality may be a better fit in the context of a social democratic (rather than a laissez-faire liberal) state, given its focus on accommodating legitimate state objectives.[40] As we have seen, the very flexibility and fact-specificity of the proportionality test facilitates greater institutional dialogue, thus giving greater room for the state to pursue its objectives than is likely under a more rulified system. Indeed, to put the argument another way, if the critics of flexibility and context-sensitivity are correct, the ad hoc nature of such tests weakens the judiciary's resistance to the legislature and thus weakens the protection of rights. Accordingly, the tendency of doctrinal flexibility to maximize room for the legislature is widely agreed upon, even if its desirability is disputed.

This feature of proportionality tests explains why proportionality has proved congenial to Canadian constitutionalists. As has been well explored elsewhere, Canada is more statist than the United States.[41] This

[39] Stone, supra note 36, at 259.

[40] Richard Mullender argues, "Proportionality is a mediating principle. It provides guidance on the question as to how we should seek to accommodate both the public interest in the pursuit of generally beneficial outcomes and the countervailing interests of individuals and collectivities." Richard Mullender, Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy, 27 J.L. & Soc'y 493, 503 (2000).

[41] Seymour Martin Lipset, Continental Divide: The Values and Institutions of the United States and Canada 8 (1990).

trend is well-revealed in its constitutional law and specifically in the law of section 1 of the *Charter*. Although it would be a mistake to discount the idea of mistrust of government entirely,[42] the specter of governmental abuse of power and misjudgment does not loom nearly so large as it does in the United States.[43] The Canadian confidence in government as a constructive force has been evident from the early days of *Charter* interpretation. Chief Justice Dickson's judgment in *R. v. Edwards Books* provides some important expression of this sentiment: "In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that [the *Charter*] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."[44]

B. Australia

The Australian case introduces a further complexity to our observation as to the connection between preferences along the spectrum from rules to standards in free speech adjudication. Australia's legal, political, and constitutional heritage is in many respects similar to Canada's, and certainly much closer to Canada's than to the United States'. Its political culture, particularly the political consensus surrounding the role of the state, is also much closer to Canada's than to the United States'. Indeed, the strong expectations of the state and the degree of state involvement in social and economic life are amongst the most remarked upon aspects of Australia's political culture.[45]

[42] See R. v. Keegstra, [1990] 3 S.C.R. 697, 763 (Can.) ("*[T]he state should not be the sole arbiter of truth*, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas." (emphasis added)).

[43] The point is colourfully put by Jamie Cameron: "Unlike Americans, [Canadians] do not live in obsessive fear of the *state*. Instead, we live in obsessive fear of the *United States*. We don't lack confidence in the viability of parliamentary institutions. We lack confidence in our viability as a nation." Alan Borovoy et al., The James McCormick Mitchell Lecture—Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation, 37 Buff. L. Rev. 337, 357 (1988).

[44] R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713, 779 (Can.). The Court is wary of the substantive due process jurisprudence of the Lochner Era, during which the United States Supreme Court invalidated much progressive economic regulation. See R. v. Wholesale Travel Grp. Inc., [1991] 3 S.C.R. 154, 233–34 (Can.); Sujit Choudhry, The *Lochner* Era and Comparative Constitutionalism, 2 Int'l J. Const. L. 1, 27 (2004).

[45] Famously, W.K. Hancock wrote: "Australian democracy has come to look upon the State as a vast public utility, whose duty it is to provide the greatest happiness for the greatest number." W.K. Hancock, Australia 72 (1930); see also Frank Bongiorno, Dreamers and Schemers: A Political History of Australia 448 (2022) (contending that Hancock's description

Our argument as put so far would suggest that Australian attitudes to balancing in the free speech context—and proportionality in particular—would resemble those found in Canada. Yet Australian constitutionalism is remarkably ambivalent about proportionality as a standard of constitutional review and has shown some notable instability on this score. At various times, it embraces and then resiles from proportionality analysis, in the process vacillating between more rule-like and more standard-like approaches. This section describes and attempts some explanation of these observations.

1. The Australian Position

I will begin, however, by tracing the somewhat complex Australian position. Under the Australian *Constitution*, "freedom of speech" is protected by a doctrine known as the "freedom of political communication"[46]: an unwritten doctrine derived from the democratic features of the Australian Constitution.[47]

For almost two decades, the starting point was provided by the High Court of Australia's adoption of a standard of review that appeared to mimic proportionality—albeit in distinctively Australian terms. Pursuant to this standard of review, the Court asks, "[I]s the law reasonably appropriate and adapted to serve a legitimate end"?[48] Like

remains accurate, with "broad acceptance . . . that government should play the predominant role in defining where the boundaries between individual rights and the common good lie"); Lynsey Blayden, Active Citizens and an Active State: Uncovering the 'Positive' Underpinnings of the Australian Constitution, 52 Fed. L. Rev. 293, 304–05 (2024) (discussing the active role that the Australian colonial government played in the lives of its citizens).

[46] The Australian Constitution protects "political communication" rather than "freedom of speech" per se, though in most ways the "freedom of political communication," as the doctrine is known, operates in a similar fashion to a right of freedom of expression. See Adrienne Stone, Expression, *in* The Oxford Handbook of the Australian Constitution 952, 954–55 (Cheryl Saunders & Adrienne Stone eds., 2018); Adrienne Stone, Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication, 25 Melb. U. L. Rev. 374, 388–90 (2001) [hereinafter Stone, Rights, Personal Rights, and Freedoms]; Adrienne Stone, The Forms of Freedom of Expression, *in* The Elgar Companion to Freedom of Speech and Expression (Ashutosh Bhagwat & Alan K. Chen eds., forthcoming May 2026) (manuscript at 14–16) [hereinafter Stone, The Forms of Freedom of Expression], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5625370 [https://perma.cc/6YAW-29DK].

[47] On the distinction between this form of freedom of communication and a more conventional right of freedom of expression, see Stone, The Forms of Freedom of Expression, supra note 46 (manuscript at 14–18).

[48] Lange v Austl Broad Corp (1997) 189 CLR 520, 567 (Austl.). Or in full, "is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is

proportionality, this standard of review involves means-ends analysis and contains language ("reasonably appropriate") that allows for context sensitive judgment. However, it does not explicitly direct attention to a consideration of possible alternative means, and the language of balancing is notably absent. Perhaps because of these features, the "reasonably appropriate and adapted" standard has often been applied in a deferential manner.[49]

Furthermore, despite the apparent clarity on this score, the methodological preference of Australian courts as between rules and standards was not immediately clear. In the period after the High Court of Australia first announced its adoption of this standard of review, the Court nonetheless appeared to fluctuate between a preference for more rule- and standard-like approaches.[50]

But in 2015, it appeared that Australia had entered the worldwide constitutional mainstream with the adoption of structured proportionality in a form that clearly drew from German and Canadian law and entailed flexible balancing analysis. Specifically, in its new form, the Court would now consider three additional inquiries "as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses":

> *suitable*—as having a rational connection to the purpose of the provision;
>
> *necessary*—in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
>
> *adequate in its balance*—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[51]

compatible with the maintenance of the constitutionally prescribed system of representative and responsible government"? Id. In a footnote that immediately followed the passage just quoted, the High Court stated "In this context, there is little difference between the test of 'reasonably appropriate and adapted' and the test of proportionality." Id. at 567 n.272.

[49] Stone, supra note 7, at 676–78 (noting, though, that it is less deferential in the context of freedom of political communication than in some other contexts).

[50] See id. at 676–79.

[51] McCloy v New South Wales (2015) 257 CLR 178, 194–95 (Austl.) (footnote omitted).

Despite the apparent settling of the matter in 2015, the decade since has seen a long-running controversy within the Court with considerable (and growing) opposition to proportionality analysis. The position now seems to be that while *McCloy*, and proportionality analysis with it, has not been overruled, most members of the Court decline to use it, preferring the older "reasonably appropriate and adapted" formulation.[52]

Moreover, a highly significant voice among the proportionality opponents—Chief Justice Stephen Gageler—favours a form of analysis that *calibrates* the intensity of scrutiny according to the nature of the burden on political communication, the importance of the law's objective, and the institutional position of the Court.[53] Thus, Chief Justice Gageler appears to envisage the development over time of some form of a tiered scrutiny, which is at least a step in the direction of a more rule-like approach. Thus, like other briefer flirtations with a proportionality test,[54] the adoption of proportionality analysis in *McCloy* has also been followed by a retreat,[55] and the Court's record of vacillating between more rule-like and more standard-like approaches continues.

2. Australian Ambivalence

This doctrinal instability reveals distinctive aspects of Australia's constitutional and jurisprudential culture, both as compared with the United States and—despite outward similarities—as compared to Canada. Three aspects of Australia's constitutional culture have combined to produce this distinctive response.

[52] See Babet v Commonwealth [2025] HCA 21 (12 February 2025) 14–15 (Austl.) (opinion of Gageler, CJ & Jagot, J); id. at 23 (opinion of Gordon, J.); id. at 84 (opinion of Gleeson, J); Farmer v Minister for Home Affs [2025] HCA 38 (15 October 2025) 14 (Austl.) (opinion of Gageler, CJ, Gordon & Beech-Jones, JJ); id. at 39 (opinion of Edelman, J.).

[53] See *McCloy*, 257 CLR at 235–38 (opinion of Gageler, J); Brown v Tasmania (2017) 261 CLR 328, 378 (Austl.) (opinion of Gageler, J). For further discussion, see Rosalind Dixon, Calibrated Proportionality, 48 Fed. L. Rev. 92, 95–96 (2020).

[54] See, e.g., Stone, supra note 7, at 679–80.

[55] This was confirmed recently in *Babet*, where three members of the Court (consisting of Chief Justice Gageler and Justice Jagot in joint reasons at ¶ 49, and the separate concurrence of Justice Gordon at ¶ 72) reverted to the older formulation, though without overruling *McCloy*. *Babet*, [2025] HCA 21, at 14–15 (opinion of Gageler, CJ & Jagot, J); id. at 23 (opinion of Gordon, J). A fourth member did not decide. Id. at 94–96 (opinion of Beech-Jones, J).

The first arises from Australia's unusual constitutional position with respect to rights.[56] Although Australia has an old, written constitution and a long-standing practice of judicial review, its constitution is principally devoted to structural and federal provisions, leaving little that resembles constitutional rights adjudication elsewhere.

The protection accorded to political communication is perhaps the clearest exception, but even so, the Australian High Court has continually insisted on a sharp distinction between a "personal right" of freedom of speech or expression and the Australian norm of freedom of political communication. The distinction is overstated by the Court[57] and only inconsistently observed,[58] but it has formed the basis for some of the resistance to proportionality analysis. That is, for some judges the reason to reject proportionality analysis lies in its association with the implementation of rights provisions. And even those judges who accepted it were at pains to stress its adaptation to the Australian context.

This comparatively inward approach to freedom of political communication explains reservations about European or Canadian style proportionality, but the concerns about balancing analysis go deeper. In the distinctively Australian formulation of proportionality, the balancing element of the test is considerably qualified, requiring only that the

[56] Mark Tushnet, The Inevitable Globalization of Constitutional Law, 49 Va. J. Int'l L. 985, 986 (2009) ("Australian exceptionalism seems rooted in a deep national commitment to legislative supremacy as the best expression of democratic self-governance."). See generally Adrienne Stone, Australia's Constitutional Rights and the Problem of Interpretive Disagreement, 27 Syd. L. Rev. 29 (2005) (noting that Australia has few constitutional rights and that some provisions commonly understood as rights are better understood in other ways).

[57] The doctrine is structurally and substantively similar to a right of freedom of expression. That is, it is negative and vertical in orientation, operating principally to restrain interference with political communication, and relying on a justification that resembles the "argument from democracy" commonly advanced in support of freedom of speech. In other words, just as freedom of speech is commonly justified on the grounds that it is necessary to ensure the proper functioning of democracy, the Australian doctrine is justified on the basis that freedom of political communication is necessary to ensure that voters are sufficiently informed to exercise a true choice in elections. See Stone, Rights, Personal Rights, and Freedoms supra note 46, at 377–78, 400–01.

[58] For citations to First Amendment free speech law in the context of the freedom of political communication, see Clubb v Edwards (2019) 267 CLR 171, 230–31 (Austl.) (opinion of Gageler, J) (citing First Amendment law with respect to "time, place and manner" restrictions on speech and "buffer zones around premises providing abortion services"); Coleman v Power (2004) 220 CLR 1, 54–55 (Austl.) (opinion of Gummow & Hayne, JJ) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)); id. at 78 (opinion of Kirby, J) (citing *Chaplinsky*, 315 U.S. at 571–72).

impugned law be "adequate in its balance" and stressing consistency "with the limits of the judicial function."[59]

3. Australian Legalism and Political Constitutionalism

This last feature of Australian law points to the second element of Australia's distinctive constitutional culture—a strong commitment to formalist legal reasoning usually described by Australian judges as legalism.[60]

The preference for this formalist style is a feature of constitutional reasoning in Australia generally.[61] It is especially evident, however, in relation to the freedom of political communication, where the Court has constantly stressed that meaning is tied to "[c]onstitutional text and structure,"[62] which is in turn an effort to ensure the legitimacy of the right, given its unwritten form.[63]

This theory of adjudication will sound implausible to outsiders, and some qualifications should immediately be made. First, the implausibility of the claim that legalism can fully govern constitutional reasoning in general or freedom of political communication is well recognized, at least outside the Court.[64] Second, the commitment to legalism is often modified with explicit acknowledgment that legalist methods do not equate to an American-style originalism,[65] allow for at least some

[59] McCloy v New South Wales (2015) 257 CLR 178, 195 (Austl.).

[60] See Owen Dixon, Concerning Judicial Method, *in* Jesting Pilate and Other Papers and Addresses 152, 155 (Woinarski ed., 2d ed. 1997).

[61] See Amalgamated Soc'y of Eng'rs v Adelaide SS Co (1920) 28 CLR 129, 142–43; Adrienne Stone, Judicial Reasoning, *in* The Oxford Handbook of the Australian Constitution, supra note 46, at 472, 475.

[62] Lange v Austl Broad Corp (1997) 189 CLR 520, 566–67 (Austl.) (emphasis omitted).

[63] Stone, supra note 56, at 42–43.

[64] See Stone, supra note 7, at 670–71. For this reason, scholars strongly committed to formalist or originalist methods regard the freedom of political communication as illegitimate. See Jeffrey Goldsworthy, Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue, 23 Monash U. L. Rev. 362, 369–71 (1997); Nicholas Aroney, A Seductive Plausibility: Freedom of Speech in the Constitution 18 U. Queensl. L.J. 249, 260–62 (1995). The point is, however, also accepted by those who defend the legitimacy of the freedom of political communication. See George Williams & David Hume, Human Rights Under the Australian Constitution 168–74 (2d ed. 2013).

[65] On Australian "originalism" and its comparison with its U.S. counterpart, see Lael K. Weis, What Comparativism Tells Us About Originalism, 11 Int'l J. Const. L. 842, 845–48 (2013).

changed meaning over time,[66] and can be read "generously and not pedantically, but as a whole."[67] Moreover, legalism has not prevented the Court from making highly value-laden choices not determined by legalist methods.[68]

In any event, such formalism, considered alone, does not account for the Australian approach. Formalist theories of adjudication rely on a conception of the rule of law that requires judicial review to be constrained by some ascertainable law of general application,[69] and those values would be best pursued through a more rule-like doctrinal structure.[70]

What then accounts for the continuing Australian resistance to rules? The answer lies in a better account of the underlying motivation for Australian legalism. The most coherent rationale for the Australian Court's insistence on legalism can be attributed to a deep commitment to political constitutionalism, especially with respect to rights, that is a well-recognised aspect of Australia's constitutional culture.[71] That is, there is a strong preference for rights protection though the political branches of government.[72] On this conception of the Constitution, its role is to establish a democratic structure within which substantive disputes about matters of fundamental value, especially matters of rights are to be resolved.

The development of clear rules governing freedom of political communication has a tendency both to reveal the evaluative basis for the

[66] See, e.g., Roach v Electoral Comm'r (2007) 233 CLR 162, 173–74 (Austl.) (addressing the evolving meaning of "directly chosen by the people"); Sue v Hill (1999) 199 CLR 462, 523–25 (Austl.) (opinion of Gaudron, J) (describing the changing meaning of "foreign power"); Cheatle v The Queen (1993) 177 CLR 541, 560 (Austl.) (discussing the meaning of "jury").

[67] Att'y Gen of the Commonwealth ex rel McKinlay v Commonwealth (1975) 135 CLR 1, 17 (Austl.).

[68] For an especially clear example in the context of freedom of political communication, see Coleman v Power (2004) 220 CLR 1, 34 (Austl.) (opinion of McHugh, J); id. at 58 (opinion of Gummow & Hayne, JJ); id. at 70 (opinion of Kirby, J); Adrienne Stone, 'Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication, 30 U. Queensl. L.J. 79, 84–89 (2011).

[69] See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 14–15 (1997); Frederick Schauer, Formalism, 97 Yale L.J. 509, 510 (1988).

[70] See Stone, supra note 7, at 691.

[71] See, e.g., Tushnet, supra note 56, at 986.

[72] See Patrick Emerton, Ideas, *in* The Oxford Handbook of the Australian Constitution, supra note 46, at 143, 148–49.

decision and also to strengthen judicial protection of the underlying right. These qualities appeal to certain rule of law values but exist in tension with Australian legalist rhetoric and political constitutionalist preferences.

CONCLUSION

In its comparative analysis, this Essay has travelled some distance from Schauer's work. It is, nonetheless, demonstrative of its power. I wrote at the outset of the distinctive virtues of Schauer's work, combining respect for doctrinal detail and deep jurisprudential insight. I hope also to have shown how these essays marry these virtues to a careful form of comparativism—one that showed humility without giving up insight. Within the United States, Schauer was known as a First Amendment sceptic. When in other places, he did not shift gears to its defence, but he had a way of encouraging other scholars to face the full force of the First Amendment tradition and the insights it offered. For these reasons, his work will travel often and with great influence well beyond the United States.