Towards the Acceptance of Proportionality in Singapore Constitutional and Administrative Law[1]

I. Introduction

1 Social organization in modern democracies is premised on a paradoxical relation. Power is bestowed upon the government, only to be ultimately exercised over its source – the people.[2] A corollary of the systemic design is thus that power is to be exercised within stipulated limits, with the judiciary positioned to safeguard peoples' rights.[3] To this end, proportionality has emerged as a doctrine to guide judicial decisions over the appropriateness of legislation and governmental action.[4]

2 Crucially, proportionality necessitates a balancing exercise between competing considerations.[5] It requires a determination of whether the *extent* of an *administrative* action by a public authority was excessive in meeting a purported *end*.[6] In the context of constitutional adjudication where the doctrine has been increasingly prominent,[7] it necessitates an inquiry as to whether interferences with public rights have been superfluous.[8] To this end, it is lauded as a pivotal safeguard of human rights, particularly where it dictates the use of least intrusive means.[9]

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[1] Chia Jun Jie, Final Year J.D. Student, Singapore Management University's School of Law.
[2] John Sumpton QC, "Judicial and Political Decision-making: The Uncertain Boundary" (2011) JR 301 at 301 para 2.
[3] *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [79]; *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [55].
[4] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 University of Toronto Law Journal 383 at 384-385.
[5] See Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at p 630 para 11-081 for the 4 stage test, with particular emphasis on third stage, which characterises the proportionality analysis.
[6] See Lord Denning's statement on the test in *R v Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] W.L.R. 1052 at 1057 H.
[7] Moshe Cohen-Eliya and Iddo Porat, "The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law" (2009) 46 San Diego L. Rev. 367 at 369.
[8] Jack Tsen-Ta Lee, "According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution" (2014) 8(3) Vienna Journal on International Constitutional Law 276 at 276.
[9] Dieter Grimm, *supra* n 3 at 385.

3 Despite various jurisdictions exhibiting attitudes of acceptance towards the doctrine,[10] the likelihood of its acceptance within the Singaporean jurisdiction remains uncertain. An analysis of the cases reveals that this is largely attributable to judicial attitudes of deference, and concerns relating to an infringement of the separation of powers doctrine.[11] In advancing the stance that proportionality should be adopted in Singapore as a head of administrative review and for the purposes of constitutional adjudication, this paper seeks to address judicial concerns by:[12]

(1) adopting a comparative analysis to demonstrate the doctrine's reconcilability with a deferential standard of administrative review and concomitantly, the separation of powers principle; and

(2) highlighting its especial significance in constitutional adjudication, particularly in relation to constitutional deference.

II. Proportionality in Singapore Administrative Law

4 The Court of Appeal ("SGCA") has unequivocally stated that proportionality is not a distinct head of review in Singapore's administrative law.[13] Repeated emphasis has been placed on its unestablished status as ground of review under the common law,[14] ultimately relegating it simply to an "adjunct of irrationality."[15] Ostensibly, the

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[10] See for example, Lord Diplock's statement in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 408.
[11] See paras 10 – 11 (cf. administrative law), 18 – 20 (cf. constitutional law) below.
[12] While Jack Tsen-Ta Lee, *supra* n 7, highlights several difficulties with accepting proportionality in Singapore, there remains a lacuna on reconciling the doctrine of proportionality with judicial concerns.
[13] *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87].
[14] *Chng Suan Tze*, *supra* n 2 at [121]; *Colin Chan Hiang Leng v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [38].
[15] *Colin Chan Hiang Leng*, *id* at [38]; *Chai Chwan v Singapore Medical Council* [2009] SGHC 115 at [26].

Singaporean courts have not conflated the meanings of two obviously distinct doctrines, but are in effect permitting judicial review of disproportional governmental decisions only within a limited set of *factual* circumstances.

A. Acceptance within Factual Limits

5 In *Chng Suan Tze v Minister for Home Affairs*,[16] the SGCA explained that such a situation would require the governmental action to be so "disproportionate…(as) to be irrational."[17] In articulating the need to *factually* satisfy the stringent requirements of irrationality, the court was not implicitly *permitting* the applicability of the proportionality doctrine by limiting its ambit. Conversely, this was an emphasis of the irrationality head of review, and is in effect a rejection of proportionality as an independent doctrine.[18] A comparative analysis significantly *advances an understanding* of the judiciary's apprehension, and ultimately presents significant grounds for *reconciliation*.

(1) Perceived Doctrinal Challenges

6 In *Dow Jones Publishing Co v Attorney-General*,[19] the SGCA observed that it perceives a substantial overlap between the doctrines of proportionality and irrationality,[20] rendering the former effectively redundant. The court was alluding to the fact that within the limited range of *factual* situations in which it was willing to exercise its

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[16] *Supra* n 2 at [79].
[17] *Id*, at [79].
[18] *Chee Siok Chin v Minister for Home Affairs*, *supra* n 12 at [87].
[19] [1989] 1 SLR(R) 637.
[20] *Id* at [60].

powers to review governmental decisions, it was simply unnecessary to invoke proportionality given that irrationality *could* already apply.[21]

(a) Comparative Analysis

7 This main concern enunciated by the SGCA have recently been echoed by the United Kingdom's Supreme Court.[22] Crucially, the nature of *both* tests are similar since they necessitate a balancing exercise between competing considerations, and are distinct mainly in the intensity of review.[23] As such, courts and commentators alike have noted that it is inevitable that the practical application of *either* of the tests would yield similar results in *most* factual situations.[24] Given the substantial amount of overlap,[25] there have even been proposals to consolidate both heads of review.[26] However, a closer comparison reveals advantages in distinguishing between the two tests.

(b) Incomplete Overlap as Impetus for Acceptance

8 Proportionality remains the only test that may be successfully applied in the factual situations that fail to meet the high threshold required in administrative review under the irrationality head. As such, the distinction between the two tests, albeit subtle,

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[21] Such situations have already been observed in other jurisdictions. See Jonathan Auburn et al, *Judicial Review Principles and Procedure* (Oxford University Press, 1st Ed, 2013) at p 407 para 18.16, citing for example, *R v Secretary of State for Transport, Ex parte Pegasus Holdings* [1988] 1 WLR 990 at 1001.
[22] *Bank Mellat v HM Treasure (No. 2)* [2014] AC 700 at 770 para 20.
[23] Harry Woolf *et al, supra* n 4 at 589 para 11-010.
[24] See, for example, *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] 1 WLR 1591 per Lord Reed at 1629 para 116, and Jonathan Auburn *et al*, *supra* n 20 at 404 para 18.06.
[25] *Bank Mellat v HM Treasure (No. 2)*, *supra* n 21 at 770 para 20, per Lord Sumpton; R v Chief Constable of Sussex ex p. International Trader's Ferry Ltd [1999] 2 AC 418 at 439 per Lord Slynn.
[26] Harry Woolf *et al, supra* n 4 at 589 para 11-010.

accords a "flexibility" for the courts to do justice on the facts of individual cases.[27] In other words, while the application of either tests may yield similar results in most cases, the impetus to do justice in the remaining cases, albeit being the minority, provides a normative reason for the retention and application of both doctrines.[28] This is fundamentally rooted in the exacting nature of the proportionality test, which allows the judiciary to engage in a higher intensity of review over a public authority's decision,[29] achievable only through its transparent articulation of steps and structure.[30]

9 In sum, a review of both tests reveals that the Singaporean courts have misinterpreted the substantive legal test which proportionality prescribes, by restricting its ambit summarily on a thin doctrinal basis. On this analysis, it is submitted that the doctrine of proportionality could potentially play a significant role in administrative law as an independent head of review. However, its acceptance remains subject to a perceived "unsuitability" of the doctrine with the Singaporean jurisdiction, addressed in turn.

(2) (In)Compatibility with Singaporean Legal Culture

10 In *Chee Siok Chin v Minister for Home Affairs*, the court labelled proportionality as a *European* doctrine in substantiating the position of its non-applicability in Singapore.[31] Such a *jurisdictional* reference is significant in revealing concerns relating to the suitability of the doctrine in the context of the local legal *culture*. In this regard, it is to

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[27] *Ibid.*
[28] Jonathan Auburn *et al*, *supra* n 20 at 404 para 18.06.
[29] See Paul Craig, Administrative Law (Sweet & Maxwell, 5th Ed, 2003) at p 617–638; William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at p 366.
[30] Harry Woolf *et al, supra* n 4 at 830 para 14-105, and at 588-589, paras 11-009 to 11-010.
[31] Comments by V K Rajah J (as he then was) on proportionality in *Chee Siok Chin v Minister for Home Affairs, supra* n 12 at [87] were made in relation to both constitutional and administrative law.

be noted that the Singaporean judiciary adopts a "green light" approach in administrative review,[32] with a general attitude of deference.[33] The non-acceptance of proportionality in Singapore is largely rooted in these dispositions.

11 In *Colin Chan Hiang Leng v Minister for Information and the Arts*,[34] the SGCA cited Lord Lowry[35] to underscore cultural difficulties with accepting a proportionality analysis in Singapore. The court was concerned with the danger that the courts might exceed its supervisory jurisdiction over the governmental bodies, by venturing into polycentric matters not strictly legal in nature. Consequently, a proportionality review might cause the judiciary to "intrude into the legislative sphere of parliament as well as engage in policy making",[36] potentially infringing on the legality not merits principle. The court perceived that such an "usurpation of power and responsibility that rightly belongs to the minister"[37] would violate the separation of powers doctrine,[38] undermining the foundations of democracy.

(a) Comparative Analysis

12 This sense of incompatibility with Singapore's legal culture is largely rooted in the intensity of a proportionality review. It is established that the judiciary should refrain from direct involvement with public, political processes.[39] On this note, the exacting

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[32] Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 Sing Acad LJ 469 at 479–483; *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [48].
[33] *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [95].
[34] *Supra* n 13 at [42].
[35] *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696 at 766.
[36] *Yong Vui Kong v PP* [2010] 3 SLR 489 at [80].
[37] *Supra* n 13 at [44].
[38] Mark Elliott and Robert Thomas, "Tribunal Justice, Cart and Proportionate Dispute Resolution" (2012) Cambridge Law Journal 297 at 312-313.
[39] John Sumpton QC, *supra* n 1, in general.

nature of the proportionality test presents difficulties, especially since its application could lead to instances where the court would have to contemplate the authority's judgment against its own[40]. In these instances, Lord Neuberger noted that the application of the balancing test potentially requires the courts to be effectively "considering the merits of the decision" at issue,[41] particularly where balance is excessively tipped.[42] Across jurisdictions, the central tenets of concerns with adopting a proportionality review revolve around the infringement of the "legality not merits"[43] and concomitantly, the separation of powers doctrine.[44] However, a comparative analysis reveals that a deferential attitude towards judicial review is not inherently incompatible with proportionality, given that it exists not as a monolithic doctrine, but is sufficiently flexible to be customized to suit specific jurisdictional needs. It is precisely this element of flexibility which (1) permits the preclusion of judicial review of specific categories of polycentric or non-justiciable matters, and (2) enables a deferential standard of proportionality review.

(b) Proportionality – A Flexible Doctrine Customizable to Local Needs

13 As part of a greater reluctance to review non-justiciable matters,[45] specific categories of issues have been especially isolated by the Singaporean courts to be placed on a pedestal.[46] However, the more exacting *standard* of review entailed in a proportionality

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[40] William Wade and Christopher Forsyth, *supra* n 28 at p 366.
[41] *R (Keyu and Ors) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 at [133].
[42] William Wade and Christopher Forsyth, *supra* n 28 at p 369 citing *Edore v Home Secretary* [2003] 1 WLR 2979.
[43] *SGB Starkstrom Pte Ltd v Commissioner for Labour, supra* n 2 at [56].
[44] *Id,* at [58]-[59].
[45] See the Court of Appeal in *Tan Seet Eng*, supra n 32 at [100] drawing the relation between deference and non-justiciability.
[46] *Colin Chan Hiang Leng v Minister for Information and the Arts*, *supra* n 13 at [44], *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR 453 at [96] – [97].

analysis does not automatically enable the judiciary to review *all types* of matters. This sense of an inherent flexibility of the doctrine served the basis for a leading practitioner's handbook to suggest that where governmental bodies ought to retain wide discretion over its exercise of power especially over polycentric matters, the courts may undertake a deferential standard of proportionality review.[47] This entails either an undertaking of an examination of the factual accuracy of the decision, or even totally precluding itself from any taking on any form of review as the case so requires.[48] By confining the *ambit* of the proportionality doctrine by limiting the extent of review or precluding its application altogether, it appears that the non-justiciability concerns in specific cases would be addressed.

14 On top of concerns relating to the *types* of cases where the judiciary has been reluctant to adjudicate, there are further concerns that the increased *intensity* of review under the proportionality approach would entail a merits review. However, a comparative analysis shows that proportionality may be customized to be aligned with deferential attitudes of review. The Irish courts provide an empirical example of such a variant, which ensures compliance with the separation of powers doctrine. In *Tuohy v Courtney*,[49] the court introduced a "deferential standard of review" in applying the proportionality test,[50] and ultimately formed the basis on which subsequent courts applied proportionality in a deferential manner.[51] In this instance, the court did not apply its mind to the test of whether the "least intrusive action was applied by the

[47] Harry Woolf *et al, supra* n 4 at 832 para 14-108, citing *People's Mojahedin Organisation of Iran* [2008] E.C.R. II-3487 at [55]; *Spain v Commission* (C-525/04 P) [2007] E.C.R. I-9947 at [57].
[48] For example, where national security is concerned. See Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere But Here?" (2012) 22 Duke Journal of Comparative and International Law 291 at 299-300.
[49] [1994] 3 I.R. 1.
[50] Brian Foley, "The Proportionality Test: Present Problems" (2008) 1 Judicial Studies Institute Journal 67 at 73
[51] *Id*, at 74.

authorities" as the doctrine is traditionally applied in the European context. Instead, Hamilton C.J.'s concern was whether the hardship caused was "undue and unreasonable"[52] to be disproportionate that judicial intervention would be necessary. This is but one example of multiple cases[53] where it has been repeatedly emphasized that a proportionality review "does not mean that there has been a shift to merits review."[54] Such an approach alleviates the hardship which follows from the high threshold set out in an irrationality review, while stopping short of a merits review by refraining from substituting the authority's decision for what the court perceives as the least intrusive means.[55] Proportionality's significance in these cases, even with a decreased intensity of review, is particularly apparent given the novel nature of the mode of inquiry, ultimately presenting a normative argument for its acceptance in Singapore.

15 The above cases provide empirical examples of a deferential approach to proportionality review. On top of illustrating that proportionality may be applied in a *context*, they demonstrate that it is the judiciary's specific application of the seemingly flexible doctrine that *determines* its (un)suitability for administrative review.

III. Proportionality in Singapore's Constitutional Adjudication

16 In European jurisdictions, proportionality features prominently in human rights cases.[56] Although the English courts have not adopted proportionality as an independent head

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[52] *Tuohy v. Courtney*, supra n 48 at [48].
[53] *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 at [54]-[55]; *Alconbury* [2011] All ER 929 at [52]; *R (Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 at [30].
[54] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 at para 28, per Lord Slynn.
[55] *Huang v Secretary of State for the Home Department* [2007] WLR 581 at [13].
[56] *Hirst v United Kingdom* (2006) 42 E.H.R.R. 41 at [78] – [79]; Harry Woolf *et al, supra* n 4 at p 588 para 11-009 and p 848 para 14-139 citing *Schmidberger* [2003] E.C.R. 1-5659.

of review at common law,[57] it has been applied distinctively in human rights cases.[58] While Singapore does not have explicit statutory safeguards of human rights unlike other jurisdictions, [59] the Constitution embodies corresponding "fundamental liberties".[60] On this note, Lee argues that the courts should adopt a proportionality analysis in adjudicating cases that pertain especially to the restriction of these *constitutional* rights.[61]

17 I agree. The Constitution exists as a fundamental law of the land which embodies state-society relations in stipulating guaranteed rights, and limiting the power of the state.[62] The elevated status of the Constitution is the fundamental reason why the more "exacting" test of proportionality *should*[63] occupy a more prominent place especially within the context of constitutional adjudication.[64] Given that the courts have a *duty* to uphold the Constitution[65] especially in guarding against the arbitrary interference with peoples' rights, [66] discourse on the matter goes so far as to points towards the replacement of *Wednesbury* unreasonableness with a proportionality analysis whenever human rights are concerned.[67]

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[57] *Pham v Secretary of State for the Home Department*, *supra* n 23 at 1625 F para 105 per Lord Sumpton; *R (Keyu and Ors) v Secretary of State for Foreign and Commonwealth Affairs*, *supra* n 40 at 1410 para 136 per Lord Neuberger.
[58] *R (Daly) v Secretary of State for the Home Department*, *supra* n 53 at 545 C para 21 per Lord Bingham; *(Keyu and Ors) v Secretary of State for Foreign and Commonwealth Affairs*, *supra* n 40 at 1446 para 280 per Lord Kerr.

[59] See for example, Human Rights Act 1988 (UK) Cap 42; Hong Kong Bill of Rights Ordinance (Cap 383).
[60] Constitution of the Republic of Singapore (1999 Reprint) Articles 9 – 16.
[61] Jack Tsen-Ta Lee, *supra* n 7 at 302.
[62] *Yong Vui Kong v PP*, *supra* n 35 at [78]-[80]; *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].
[63] *Clinton v. An Bord Pleanála* (No. 2) [2007] 4 IR 701 at 723.
[64] Ian Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg" (2002) PL 265 at 272; Moshe Cohen-Eliya and Iddo Porat, *supra* n 6 at 369; Jonathan Auburn *et al*, *supra* n 20 at 405 para 18.11.
[65] Rt. Hon. Lord Hoffman, "A Sense of Proportion" (1997) 32 Irish Jurist N.S. 49 at 50.
[66] Bernhard Schlink, *supra* n 47 at 297.
[67] Michael Taggart, "Proportionality, Deference, Wednesbury" (2008) New Zealand Law Review 423 at 423.

18 However, there remains significant factors that hinder the acceptance of a proportionality analysis in Singapore including, inter alia, the deferential attitudes of the judiciary.[68] In sum, a judicial attitude of deference towards the other branches of a politically dominant government, has been isolated as one of the key factors that potentially impedes the acceptance of the doctrine within the local context.[69]

A. Constitutional Deference

19 It is submitted that while a deferential attitude towards the other branches of government is essential particularly in the context of democratic processes which uphold political accountability,[70] such an attitude of deference needs to be appropriately directed where constitutional issues are concerned. On top of the inherent significance of rights, constitutional adjudication presents a peculiar scenario where the executive and/or legislative action have potentially infringed upon primary rights, warranting a higher level of judicial involvement.[71] Under such circumstances, the separation of powers doctrine no longer warrants deference to be paid towards the other branches of government, but rather, requires judicial intervention in order to ensure *deference towards the* C*onstitution*.[72]

20 The Singaporean courts have appreciated the increased intensity of the proportionality approach, but has been slow to acknowledge the change in the *subject matter* which legislative and executive actions are to be benchmarked against in the context of constitutional adjudication. Where the legislature and/or a public authority promulgates

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[68] Jack Tsen-Ta Lee, *supra* n 7 at 299.
[69] *Ibid*.
[70] Jonathan Auburn *et al*, *supra* n 20 at p 416 para 18.43.
[71] Rt. Hon. Lord Hoffman, *supra* n 64 at 60-61.
[72] Harry Woolf *et al, supra* n 4 at p 641 para 11-098, John Sumpton QC, *supra* n 1, para 31.

an action which violates the constitution of the land, it is precisely because of the separation of powers that the judiciary has a *constitutional duty* to intervene. In constitutional adjudication, it is submitted that a proportionality approach is already a deferential standard or review, given that the courts are not striking down governmental action on the plain basis that it perceivably infringes constitutional rights, but rather, requires the infringement to be disproportionate before the judiciary intervenes.[73] However, so long as the courts fail to appreciate its *constitutional* role as the ultimate guardians of peoples' rights,[74] the true extent of *rights* are unlikely to be empirically realized.[75]

IV. Conclusion

21 This essay has addressed several practical concerns vis-à-vis judicial deference in advancing the efforts to push for the acceptance proportionality in both administrative and constitutional law. While the myriad of complex issues relating to the acceptance has not been thoroughly canvassed, a comparative analysis of the doctrine reveals immense promise particularly in relation to the reconcilability of the doctrine with Singapore's law and legal culture.

22 It is acknowledged that the application of proportionality may adversely impact the actions of authorities by stimulating the creation of a culture of excessive legal caution. However, it is submitted that such mere *inconveniences* are minuscule objections in furtherance of a governmental culture of justification.[76] The adoption of an exacting

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[73] Paul Daly, "Deference, Proportionality and Fundamental Rights" Chapter 5 in *A Theory of Defence in Administrative Law: Basis, Application and Scope* (2012, Cambridge University Press) at 204.
[74] *Miss Behavin' v. Belfast City Council* [2007] UKHL 19 at 139, Per Baroness Hale.
[75] Jack Tsen-Ta Lee, *supra* n 7 at 303.
[76] Harry Woolf *et al, supra* n 4 at 641 – 642, para 11-098 – 11-102.

doctrine of judicial review encourages improved decision making,[77] while achieving greater rights protection by requiring the state to consider less intrusive means or legislation to achieve purported ends.[78] Further, the structured mode of inquiry promotes transparent decision making,[79] and has therefore been perceived as a "precept of justice".[80] Crucially, given that elements of the test already exists in local jurisprudence to various degrees,[81] the non-acceptance of proportionality in the near future would be peculiar.

[77] J Jowell, "In the Shadow of Wednesbury" (1997) JR 75 at 80.
[78] Harry Woolf *et al, supra* n 4 at 641 – 642, para 11-098 – 11-102.
[79] Vicki C. Jackson, "Constitutional Law in an Age of Proportion" (2015) 124 Yale Law Journal at 3102 – 3103.
[80] *Id*, at 3098.
[81] Jack Tsen-Ta Lee, *supra* n 7 at 302.