PROPER PROPORTIONS OF LAW:
JUSTIFYING DEMOCRATIC CREDENTIALS OF PROPORTIONALITY ANALYSIS
IN CONSTITUTIONAL ADJUDICATION

by

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When scholars speak of proportionality, they most likely speak of the multi-pronged analytical frame for norm-based argumentation — which it certainly is. Indeed, be it the Canadian Oakes test or European “fair balance,” proportionality is deemed to be “the best possible” discursive technique to achieve “a positive partnership” between conflicting constitutional rights and laudable legislative objectives. However, there is more to proportionality than a formulaic framework: as canvassed throughout the thesis, there exist notorious puzzles regarding the concepts and vocabularies involved in the proportionality rhetoric; there is likewise a need to critically analyze the assumptions and presuppositions underlying modern proportionality discourse. Last but not least, the very invocation of proportionality into rights adjudication calls for doctrinal — as well as legal and democratic — justification. From the European Union to Canada, from South Africa to Brazil, constitutional jurisprudence is currently filled with proportionality formulaic parlance, whereas — and this last point is of particular significance — very few Constitutions explicitly speak of proportionality, not to mention the multi-pronged tests. In this thesis, I take a wider view of the matter and propose a new paradigm for bridging the epistemological gap between the constitutional need to reconcile competing private and public interests, on one hand, and invocation of proportionality formula into constitutional jurisprudence, on the other.
PREFACE

This thesis is original, unpublished, independent work by the author, Iryna Ponomarenko.
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ACKNOWLEDGEMENTS

Mastering the art of balance is a *sine qua non* of many human endeavors, be it making plans for family weekend, crafting governmental policies about controversial values, or finding the closing words that would strike at the emotional heart of a serious academic project. As I add the final touches to this research, I recall how on my first day of law school I went to the university bookstore and incidentally bought the *Nicomachean Ethics* by Aristotle — it caught my eye while I was waiting at the checkout. In his seminal treatise, Aristotle argues that ethical virtues are achieved by striking a proportionate balance between the opposing states: the courage means holding a mean position in one's feelings of rash and fear; the virtue of generosity lies in between wastefulness and stinginess, and so forth. “What a nonsense!” said 18-year-old I and closed a book with a slam. In those days, like every teenager, I wholeheartedly rejected the very idea of compromise.

It took me six long years to learn that life is not just black and white — it contains shadows. It is fuzzy, unpredictable, and more often than not offers no ready answers. In life, there are no winners and losers, there are likewise no universal rules about how to live well — finding the golden mean in any given situation requires weighing all relevant circumstances and exercising our unique capacity to reason. And so does law.

I am deeply indebted to my thesis supervisor at UBC, Professor Joel Bakan, who has encouraged me to undertake the project of exploring how law maintains a state of equilibrium between the opposing truths — proportionality principle in constitutional adjudication. Professor Bakan is a person to whom I will never be
grateful enough for he gave me something more than benefit of his invaluable advice and feedback while writing this thesis — he provided me with gentle guidance and wisdom that constantly fueled my love of discovery. I also owe my second reader, Professor Robin Elliot, a great debt for cultivating appreciation for linking theory and practice and Professor Mary Liston for encouraging clear thinking about the fuzzy issues.

Last and most certainly not least, deep gratitude is due to my family and friends for their patience, good humor, and love.
... so a state, by adjusting the proportion between the highest, lowest, and intermediate classes, as if they were musical notes, achieves harmony.\(^1\)

Cicero, Republic

INTRODUCTION

When scholars speak of proportionality, they most likely speak of the multi-pronged analytical frame for norm-based argumentation\(^2\) — which it certainly is. Indeed, be it the Canadian \textit{Oakes} test or European “fair balance,” proportionality is deemed to be “the best possible” discursive technique to achieve “a positive partnership” between conflicting constitutional rights and laudable legislative objectives. However, there is more to proportionality than a formulaic framework: as will be canvassed throughout the thesis, there exist notorious puzzles regarding the concepts and vocabularies involved in the proportionality rhetoric; there is likewise a need to critically analyze the assumptions and presuppositions underlying modern proportionality discourse. Last but not least, the very invocation of proportionality into rights adjudication calls for doctrinal — as well as legal and democratic — justification. From the European Union to Canada, from South Africa to Brazil, constitutional jurisprudence is currently filled with proportionality formulaic parlance, whereas — and this last point is of particular significance — very few Constitutions explicitly speak of proportionality, not to mention the multi-pronged tests.

In this thesis, I take a wider view of the matter and propose a new paradigm for bridging the epistemological gap between the constitutional need to reconcile competing

\(^1\) The remainder of the quote reads as follows: “What, in the case of singing, musicians call harmony is, in the state, concord; it constitutes the tightest and most effective bond of security; and such concord cannot exist at all without justice.” (In Marco Tulio Cicerón, Niall Rudd & Jonathan Powell, The Republic and The Laws (Oxford University Press, 1998) at 58.)

\(^2\) Consider, for instance, an approach to defining proportionality adopted in recent treatise of Aharon Barak, \textit{Proportionality: Constitutional Rights and their Limitations} (Cambridge University Press, 2012.)
private and public interests, on one hand, and invocation of proportionality formula into constitutional jurisprudence, on the other. I open Chapter 1 with the genealogical reconstruction of proportionality so as to suggest that the concept does have a history, and I trace that history to first accounts of the principle of justice. I then articulate and explore the contours of proportionality's definitions in order to correct some of the most common misconceptions about it. An important step toward that end is to scrutinize proportionality under a microscope and elaborate on the submission that holds as follows: scratch beneath the surface of proportionality, and you see balancing. As such, it is important that the mainstream canon of proportionality be critically reviewed and a more profound account of the principle be taken: whether explicit (conceived as particularized “weighing” of human rights against considerations that can justify their limitation) or in disguise (conceptualized as “fit” between means and ends of the impugned legislation,) proportionality arguments inevitably boil down to balancing public and private constitutional interests and there is an inherent merit in this frank avowal.

Pushed to its limits, this view suggests that no formal structure to value-laden argumentation can escape the balancing component which, as will be extensively covered in Chapter 2, is to be found in all proposed proportionality alternatives — both categorization- and non-categorization-based. Proceeding on the assumption that at the core of proportionality lies balancing, and that balancing in rights adjudication is inevitable, I take a step further so as to introduce my next — and probably most important — inquiry: why do constitutional tribunals around the world, in assessing salutary and deleterious effects of impugned legislation, not address balancing explicitly and directly? Simply put, what is wrong — formally, as well as substantially — with abandoning the proportionality's doctrinal matrix?

In some ways it is plausible to believe that only the substance of judicial reasoning matters. Underlying this notion would be the claim that balancing, if practiced openly, will
inevitably provide judges with the opportunity to find the “right” answers to “rights adjudication” questions. However, as counterintuitive as it may seem, this is not so. In Chapter 3 I offer an account of the “right answer” theory to suggest that balancing, in whatever form it takes, is not a “decision engineering that produces demonstrably correct answers by intelligible processes”. This is particularly so because, to begin with, in constitutional adjudication, or any adjudication for that matter, judges operate on the assumptions premised on questionable, or highly contested, normative arguments and uncertain empirical propositions — that is, they operate under the condition of epistemic uncertainty.

Another problem with the “right answer” quest is that it often fails to take into account the peculiar nature of constitutional propositions: owing to the overly high level of generality and holistic nature of the Constitution, direct enforcement of its particular clauses does not necessarily embody the “right” enforcement. Were the court to read the Constitution “as it is,” the government, in crafting the rights-infringing legislation, could circumvent the constitutional imperatives through other means — equally injurious to individual rights.4 In hard constitutional cases, therefore, in the absence of clear legal rules and empirical knowledge, judges are required to make decisions that go beyond the limit of technical rationality and engage their political and moral sensibilities. This being the case, the quest for right answers in law becomes noticeably nuanced: if the results pursued can never be strictly “right,” at least under a conventional understanding of the term, the question, as Stephen Gottlieb so correctly puts it, should be approached not as psychological or procedural, but as jurisprudential: What “improves” the results?5

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3 See Alexander T. Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96:5 The Yale Law Journal 943 at 976 (“To a large extent, the balancing takes place inside a black box.”)

4 By way of illustration, consider the following scenario: were the court to ban only facial (formal) discrimination, the government could easily evade anti-discrimination rule by crafting the discriminatory law in neutral terms, but that would have the indirect effect of discrimination.

Of all the possible solutions, one stands out in terms of the efficacy and legal rationale behind it. In refining and fixing constitutional principles, or what Mitchell Berman terms the “constitutional operative propositions”, judges design decision rules and standards — or, in modern constitutional parlance, formulae — which render the operative proposition suitable to use in the resolution of the case before the court. Not only do these rules formalize legal reasoning and supplement other doctrines (designed as rules) to implement particular constitutional principles, but they also prevent predictable efforts by the government to skirt constitutional imperatives (for instance by formal compliance with decision rules) and to raise costs for officials of evasion or violation of those principles.

This then means that the government must provide ample justification for their actions. Such anti-evasion doctrines, as Brannon Denning and Michael Kent term them, are almost ubiquitous in constitutional law. Proper purpose, rational connection, and necessity sub-tests in proportionality analysis are all illuminating examples of such doctrines. Once wrapped in the layers of these constitutional sub-tests, proportionality efficiently “stresses the need to always justify limitations on human rights”. Moshe Cohen-Eliya and Iddo Porat characterize this requirement, following South African scholar Etienne Mureinik, as a shift from a culture of authority to a culture of justification. Reminiscent of such a perspective is the recent claim of Mattias Kumm who argues that proportionality is justified by a conception of legal legitimacy which is based on the ability of the state to demonstrate to its subjects the reasons and justifications for its actions — a process which Kumm terms “Socratic Contestation.” According to this conception, the courts, using proportionality, push the

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6 As a most emblematic example, consider the doctrinal frameworks for assessing formal and substantive equality.
government to constantly provide a logical basis, and coherent reasons for its actions, which are crucial for the legitimacy of those actions.\(^\text{10}\)

Proportionality boosts the legal credentials of the court by making the decision-making procedure transparent and intelligible to participating legal actors – including those unsatisfied with the case outcome. While not camouflaging judicial lawmaking, properly employed, it requires courts to “acknowledge and defend —honestly and openly — the policy choices that they make when they make constitutional choices”.\(^\text{11}\) Although this judicial subjectivity is recognized,\(^\text{12}\) it is meant to achieve the proper solution determined according to objective considerations.\(^\text{13}\) As long as judges write opinions as though they believe that they are discovering answers in legal materials rather than simply filling gaps and resolving ambiguities, their answers are right in the sense that they are rationally (from an internal standpoint) justified. That belief itself, as Mike Dorf puts it, plays an important role in shaping and constraining what the positivist believes is the judges' discretion.\(^\text{14}\)


CHAPTER 1: PROPORTIONALITY DEFINED

In this Chapter, I aim to provide an account of the genesis and discourse of proportionality, raise theoretical and practical questions for its assessment, and illustrate the most intriguing research challenges and questions it raises (without claiming to provide comprehensive answers). I begin with a genealogical reconstruction of proportionality discourse, then briefly chart its adoption in a number of jurisdictions, and ultimately outline current understandings of it, while situating it within a comparative context.

The central concern of this chapter, therefore, will be to develop an adequate way of expressing proportionality’s meaning, regardless of the different cultural, historical, political, and legal settings in which it operates. In attempting to provide an all-embracing definition of proportionality, however, the challenge is to avoid Brian Tamanaha’s “labeling test” – specifically, that proportionality becomes whatever legal actors dealing with it attach the label “proportionality” to. For, despite the global appraisal of proportionality as a universal template upon which different constitutional discourses are supposed to ultimately converge, proportionality can mean different things in different contexts at different times.\(^{15}\) This, together with a complex interplay of these differences, creates real challenges not only for defining proportionality, but for defending it as well.

\(^{15}\) For a similar account, see, Jacco Bomhoff, “Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law” (2008) 31 Hastings Int & Comp L Rev 555.
1.1. A Case for Genealogical Reconstruction of Proportionality

The knowledge of an effect depends on, and involves, the knowledge of its cause.

Spinoza

As stated by Alec Stone Sweet and Jud Mathews, in many polities today, proportionality is treated as a taken-for-granted feature of constitutionalism.¹⁶ David Law, for his part, has posited that proportionality provides constitutionalism with a common grammar — what he refers to as generic constitutional law.¹⁷ David Beatty has gone so far as to stipulate that proportionality may ultimately amount to a global rule of law, therefore putting an end to age-old controversies over constitutional interpretation.¹⁸ What quite often escapes such observations, however, is that even in the realm of drastic reduction of barriers to trans-border movement of constitutional ideas,¹⁹ or, sensu Mark Tushnet, the “inevitable globalization of constitutional law”,²⁰ proportionality is not a necessity — it is a deliberate choice.

Despite a seeming “diffusion globally”,²¹ most legal orders still fail to embrace the discourse and practice of proportionality.²² Indeed, as a telling example, the

²⁰ Mark Tushnet, “The Inevitable Globalization of Constitutional Law” (2009) 49 Va J Int L 985. For a similar account, see, e.g., Duncan Kennedy, “Two Globalizations of Law & Legal Thought” (2003) 36 Suffolk U L Rev 631, who posits that the idea of “balancing of conflicting considerations’ is a defining characteristic of a “globalization of law and legal thought’ that has taken place since World War II.”
²¹ Proportionality is now reported to dominate the dockets of constitutional tribunals across the European continent, as well as in common law systems as diverse as Canada, South Africa, Israel, and the United Kingdom.
²² There is little to say, for instance, regarding the application of the proportionality framework in the Eastern Europe democracies. At the same time, proportionality is indeed reported to increasingly gain
United States, which in many respects is the driving force behind the global success of constitutional judicial review — is explicitly opposed to the idea of constitutional borrowing in general, and proportionality in particular.\textsuperscript{23} Furthermore, even in the legal orders where proportionality seems to permeate all aspects of constitutional legal discourse, courts may \textit{de facto} deploy analytically and structurally different discursive techniques while still claiming, \textit{de jure}, to operate under the “proportionality” rubric. Stated otherwise, the mere fact that legal actors invoke the “proportionality” language — be it “balancing,” “weighing,” or “means-ends analysis” — does not necessarily signal the application of proportionality principles and process.

Moreover, on closer scrutiny it appears that different proportionality frameworks, as applied across different legal orders, may well be derived from almost identical constitutional provisions. This, in turn, challenges jurists to account for such differences by going beyond mere textual interpretation — by noting the significance of non-legal contexts, such as historical and political discourse. An illuminating illustration of different judicial approaches to rights adjudication can be found in comparing jurisprudence from each of the European Court of Human Rights and the Supreme Court of Canada. In both Strasbourg’s Convention\textsuperscript{24} and the Canadian Charter,\textsuperscript{25} the guaranteed rights are qualified by limitation clauses

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expressed in very similar terms. However, the respective courts actually engage in strikingly different reasoning processes. How do we account for these differences?

It has become increasingly and regrettably common for commentators to identify similarities in how terms like “balancing” and “proportionality” are used without questioning the underlying parameters that provide these terms meaning. This is perhaps due to the fact that, as observed by the US Supreme Court Justice Breyer, “[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances”.\(^\text{26}\) Yet if we are to properly relate proportionality to some universal “template”, as many posit we should, we cannot characterize it solely or mainly in terms of its abstract features, but must account for the fact that it gains meaning in specific legal landscapes and historical contexts. Nor, it should be noted, has proportionality remained unaltered from its original form (that is, copy-pasted) when subsequently migrating to other legal orders — although it is plausible to assume that proportionality does “travel well,” sensu Twining.\(^\text{27}\)

It may be useful to sum up the arguments which necessitate the genealogical reconstruction of proportionality and its comparative treatment. To begin with, in some respects, the study of proportionality must be premised upon genealogical foundations, as is indeed the case with the study of any kind of legal concept. Borrowing Spinoza’s presupposition, to know proportionality adequately is to know it in its necessity, as it has been fully determined by its causes. In the second place, and perhaps even more importantly, a sense of history is vital to understanding

proportionality because it tends to highlight its limitations. Indeed, certain scholars
argue about the worldwide convergence upon proportionality as an advent of the
“ultimate rule of law”. However, Great Britain – which is the birthplace of the rule
of law doctrine in its literal sense – these days shakes the European community by
claiming to withdraw from the European Convention on Human Rights, primarily
due to Strasbourg’s “ludicrous abuses of justice carried out in the name of human
rights”. There is a strongly held belief that this is due, in part, to a desire to
circumvent the proportionality arguments that the European Court of Human Rights
jurisprudence is based upon.

At the same time - and this is the next argument in favor of genealogical
reconstruction - being situated within its historical context, proportionality may be
better defended against global criticism as this helps elucidate the centrality of
proportionality to the constitutional nature of rights. I may exemplify this argument
by referring to Grégoire Webber’s assessment of proportionality and his proposed
alternatives to it. As put by Aharon Barak, “[t]he accepted and proper view
considers constitutional rights as a shield to protect individuals from the tyranny of

21 Const Commentary 803.
29 Simon Walters, “A great day for British justice: Theresa May vows to take UK out of the European
Court of Human Rights” 2 March 2013, Daily Telegraph Online: <http://www.dailymail.co.uk/news/article-
2287183/A-great-day-British-justice-Theresa-May-vows-UK-European-Court-Human-Rights.html>
30 For a further assessment, see, e.g., Jonas Christoffersen, *Fair Balance: A Study of Proportionality,
Subsidiarity and Primarity in the European Convention on Human Rights* (BRILL, 2009); Jukka
Viljanen, *The European Court of Human Rights as a Developer of the General Doctrines of Human
Rights Law - A Study of the Limitation Clauses of the European Convention on Human Rights*
(Tampere: Tampereen yliopisto, 2003); Mahoney, “Judicial Activism and Judicial Self-Restraint in the
European Court of Human Rights: Two sides of the Same Coin” (1990) 11 Human Rights Law Journal
57; Greer, “Balancing” and the European Court of Human Rights: A Contribution to the Habermas-
University Press, 2009).
the majority, as reflected by the legislator”.32 Webber, *a contrario*, views the scope of constitutional rights as determined by the legislator – the very same body that expresses that type of tyranny of the majority. Webber further proceeds on the assumption that, once the respectful boundaries are set (with the right’s proper interpretation and the limitation set by legislation), the rights become absolute. Implicit in such a perspective is that there is no need for proportionality – or the balancing at its core – which is the dominant motive of what Webber, “somewhat polemically” as he himself admits, called “the cult of constitutional rights scholarship”.33 Pushed to its limits this view suggests that “the task of interpreting the scope of the right and setting its limits are provided to the legislator, and to the legislator alone”.34 This view is reminiscent of the approach of the United States Supreme Court35 and the jurisprudence of the authors brought forward by Webber in support of his criticism of proportionality – namely Habermas, Nozick, and Dworkin36 – but is not identical to theirs as it is more extreme.37 Yet, a legal system which would adopt such an approach, or any similar type, would risk undermining the constitutional nature of rights.


35 For a closer analysis of the categorization-based alternatives to proportionality as per American jurisprudence, as well as American strict scrutiny doctrine, see below, this chapter.


37 It is of note that there is also a connection between Webber’s and Jeremy Waldron’s approaches towards the judicial review. Waldron, for instance, argued that judicial review in Canada is not proper despite the existence of the limitation clause (Jeremy Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346 at 1356.)
While there is room for disagreement here, it is important to bear in mind that the true purpose of every constitutional bill of rights is to limit the legislator— and certainly not to grant it as wide a discretion as Webber advocates. In a similar vein, as per the extensive historical analysis recently offered by Moshe Cohen-Eliya & Iddo Porat, proportionality was created as part of an attempt to protect individual rights against a background of little textual support for such protection. The latter issue will be addressed more fully below. In the meantime, it is important to underscore that proportionality has also often been identified as the prime manifestation of the transition to a new age in legal argumentation in the course of the twentieth century— as in the absence of explicit protection of constitutional rights, many liberals resorted to the rhetoric of natural rights and anti-formalistic doctrines. With respect to balancing, which for the purposes of this analysis may be considered as analytically similar to the proportionality reasoning, Alexander Aleinikoff, in his famous study of the Age of Balancing in American constitutional law stated the following:

[B]alancing was a major break with the past, responding to the collapse of nineteenth century conceptualism and formalism as well as to half a century of intellectual and social change. ... Flying the flags of pragmatism, instrumentalism and science, balancing represented one attempt by the judiciary to demonstrate that it could reject mechanical jurisprudence without rejecting the notion of law.

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A wider understanding of proportionality, one that encompasses a genealogical account, may provide valuable insight into underlying differences and similarities in constitutional discourses and attitudes. The language of proportionality does not only mean different things across jurisdictions but can vary as well – to a significant degree – within any given jurisdiction over a period of time.\textsuperscript{42} From the beginning of the 21st century, and within a relatively short time, discussion regarding comparative studies of proportionality has been revitalized through attention to history.\textsuperscript{43} The conclusions of this work cast some doubt on the generalizing claims of, for example, Duncan Kennedy - who argues that the idea of “balancing of conflicting considerations” is a defining characteristic of a “globalization of law and legal thought” which has taken place since World War II\textsuperscript{44} - and also Lorraine Weinrib, who posits that proportionality is an element of what she calls “the Postwar Paradigm” of constitutional rights adjudication; a model for constitutional review which has had “extensive reach and deep transformative power”.\textsuperscript{45}

Recent scholarship, by offering a closer look at the phases in the development of proportionality analysis in different jurisdictions, challenges such general assumptions about the role of proportionality for global legal discourse by focusing

\textsuperscript{42} The jurisprudence of the European Court of Human Rights is an illuminating example.
\textsuperscript{44} Duncan Kennedy, “Two Globalizations of Law & Legal Thought” (2003) 36 Suffolk U L Rev 63.
\textsuperscript{45} Lorraine E Weinrib, “The Postwar Paradigm and American Exceptionalism” in The migration of Constitutional Ideas (Sujit Choudhry ed., 2006) 84.
on the contrasts, similarities, and – most importantly – *paradoxes* which emerge when reflecting upon the historical origins and further diffusion of proportionality reasoning. As correctly observed by Jacco Bomhoff, the goals of finding a common ground for the purposes of the balancing discussion – which he sees as canvassing the proportionality discourse as well – are often elusive.\textsuperscript{46} Rephrasing his claim, proportionality references in the jurisprudence of constitutional tribunals across the world may manifest both a mix of different ideas expressed in very similar ways and similar ideas expressed in slightly – but potentially significantly – different ways. In Europe and Canada, for example, balancing is hardly ever mentioned without simultaneous reference to a “principle of proportionality”, a term rarely used in U.S. legal discourse.\textsuperscript{47} Conversely, American judges and authors have often referred to balancing “tests” while such designations are unfamiliar in Europe.\textsuperscript{48} Yet as Moshe Cohen-Eliya & Iddo Porat put it, “[t]he two tests, balancing and proportionality, resemble each other in important aspects”\textsuperscript{49} and “analytical differences between the two concepts are not substantial enough to account for the differences in attitudes towards them”.\textsuperscript{50}

The work of British commentator Jacco Bomhoff also underlines the importance of situating proportionality within a historical and comparative context. On the face of it, he suggests, balancing as an analytical process fits well within


\textsuperscript{50} Ibid at 268.
traditionally dominant functionalist approaches to comparative law,\textsuperscript{51} which posit that different legal systems face similar sets of problems. Balancing and proportionality in constitutional adjudication, from this perspective, would provide universal solutions to the problems of limiting and adjusting constitutional rights protection. Yet were we to use the seemingly similar problems as the starting-point for a comparative inquiry into proportionality, Bomhoff suggests, we would soon be frustrated by a degree of isolation of legal orders and legal discourses that is considerably higher than conventionally understood.

\textbf{1.2. Proportionality: Tracing the Historical Origins}

Proportionality’s story has many chapters. As Aharon Barak observes, the notion of proportionality has inspired thinkers throughout the generations.\textsuperscript{52} Drawing on recent scholarship, this section will seek to situate proportionality in its historical and political context: for whereas none of proportionality’s questions relate solely to genealogy or evolution, all of them, as will be argued and revealed throughout the thesis, have historical dimensions.

Another purpose of this section is to suggest that critical analysis of proportionality’s evolution as traced in different parts of the world — together with key concepts of its rhetoric — is an important task for an expanded concept of

proportionality as a particular form of legal discourse, not only a formal argumentative structure or a skeleton doctrinal tool.\(^53\)

To begin with, while the orthodox narrative traces proportionality’s origins to continental European sources, especially German administrative law,\(^54\) the very notion of proportional balance is deeply embedded in classical conceptions of justice. “An eye for eye and a tooth for a tooth,”\(^55\) a proportional notion, is historically the emblematic form of a measured response.\(^56\) By the same token, the substantial contribution to the development of proportionality as a rational concept can be attributed to classical Greek notions of corrective justice (justitia vindicata) and distributive justice (justitia distributiva).\(^57\) British commentator Thomas Poole argues that “the conventional wisdom of proportionality, which if not strictly speaking incorrect is at best a very partial truth”.\(^58\) It is necessary, he says, to “turn


\(^{55}\) See Exodus 21:23-25 (“But if any harm follow [when men strive together], then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.”) See also M Miller, Eye for Eye (Cambridge University Press, 2006).


first to Plato and then to Cicero, two defining writers on law and politics in the classical world, in order to uncover an older ancestry for proportionality than is generally recognised”.\(^\text{59}\) German scholar Eric Engle, for his part, suggests that the works of Aristotle should be referred to, not least his idea “that the just is a ratio between two parties mediated by an abstract principle – is still a part of contemporary law as shown by the general principle of proportionality”.\(^\text{60}\)

Consider a characteristic example. At the centre of Plato’s dialogue *Critias*, in effect a political allegory, lies the recounting of a legend of the interaction between two ancient cities: one, (Old) Athens, embodies the excellence of equilibrium and lasting unity; the other, Atlantis, embodies the corruption that goes with unbalanced (imperial) growth.\(^\text{61}\) “The catastrophe of Atlantis, predictable ever since the description of the island, will be the physiological result of the pronounced *imbalance*\(^\text{62}\) of its constitution”.\(^\text{63}\)

For Plato, thus, the city is a political living being. It is a particular place; it is also a particular population and a particular constitution. On Poole’s reading of Plato, the city, like the men who inhabit it, has intelligence, a soul.\(^\text{64}\) The “individual and the city are identical objects, which differ only in scale and upon which the same letters are inscribed, those of the term ‘justice’”.\(^\text{65}\) Justice in respect of the individual is the same as justice in respect of the city. For both, the end to which reason guides them is a harmonious internal order. The reason and harmony of the universe is

\(^{59}\) Ibid.


\(^{62}\) Emphasis added – I.P.


\(^{65}\) J F Pradeau, *Plato and the City* (Exeter: University of Exeter Press, 2002) at 44.
arranged geometrically and consists of (or is expressed by) sets of mathematical ratios.\textsuperscript{66}

The proper means to achieve this order is law (\textit{nomos})\textsuperscript{67} – the “distribution of reason”\textsuperscript{68} – in the sense that through it, reason determines modes of conduct, and also in the sense that reason effects a \textit{distribution}\textsuperscript{69} (a sharing out of what is due to each individual in the city).\textsuperscript{70} Proportionality, as Thomas Poole stipulates, is a pivotal concept within this vision of the city. Justice, for Plato, is ultimately a question of proportional equality.\textsuperscript{71} Justice is defined by Socrates\textsuperscript{72} in the \textit{Republic} as a matter of “rendering to each that which is fitting [for him]”.\textsuperscript{73}

In a similar vein, the idea of justice as proportionality appears clearly in Aristotle’s Nicomachean Ethics, Book V. In Aristotle, as Eric Engle argues, the

\textsuperscript{66} Including the so-called Golden ratio or Golden mean, hugely influential among Renaissance artists and architects. For a pertinent discussion, see Thomas Poole, “Proportionality in Perspective” (2010) 16 LSE Law, Society and Economy Working Papers at 5.
\textsuperscript{67} J F Pradeau, \textit{Plato and the City} (Exeter: University of Exeter Press, 2002) at 142.
\textsuperscript{68} Ibid at 714a2.
\textsuperscript{69} Eric Engle (in “The History of the General Principle of Proportionality: An Overview” (2012) 1 at 3) quotes Hans Hanau, Der Grundsatz der Verhältnismässigkeit als Schranke privater Gestaltungsmacht: Zu Herleitung und Struktur einer Angemessenheitskontrolle von Verfassungswegen (2004). “Proportionality as an element of Legal Concept [Rechtsidee; lit. idea of right]. Iustitia distributiva as an ultimate form of justice. Distributive justice. The ancient [Ur] form of justice goes back to Aristotle, and later was called by the commentators distributive justice. The goal of distributive justice is relative relational equality in the treatment of different persons in measure to a pre-conditional differentiation criterion. The proportion which falls to individuals corresponds to the degree to which the differentiation criteria are fulfilled, in connection with the comparator group. This principle then determines entire categories of compensatory interests. Distributive Justice appears in various forms which can all be traced back to this principle. The exemplary case of distributive justice is the judgment of the comportment of a judicial instance which decides the allocation to third parties. In this case of (at least) three persons’ relationship, the judging instance is superior to the receivers. The judgment meets the right measure of the demands of distributive justice only when the (at least four) elements are taken into account by the judgment (i.e., A will perform C and B will perform D) in a determined (according to Aristotle) geometric proportion. If, for example, money should be distributed according to the different needs of the addresses of rights, the different degrees of necessity of A and B must correspond to the different levels of the distributed contribution (the paid-out contributions of C and D must relate to each other to the degree of the needs of A to B; A:B::C:D).”
\textsuperscript{70} J F Pradeau, \textit{Plato and the City} (Exeter: University of Exeter Press, 2002) at 142.
proportionality inquiry goes to justice as the right ratio – the relationship between a distributive principle and the shares apportioned thereby.\textsuperscript{74} He then goes a step further by positing that the idea of proportionality as a specific rule of law emerged obliquely from Aristotle’s thought as a vague and general but increasingly concrete and definite proposition of the law of self-defense \textsuperscript{75} in Cicero, \textsuperscript{76} Justinian, \textsuperscript{77} Augustine,\textsuperscript{78} and Aquinas.\textsuperscript{79}

While drawing extensively on Aristotle, Cicero’s theory of justice is also grounded in cosmological and theological roots broadly similar to those of Plato’s. As Thomas Poole describes it, Cicero assumes that there is a deep connection between cosmic order and political rule.\textsuperscript{80} Although mathematics and geometry are absent in his works, being unsuited to a Roman audience, much of the language used to express overarching political goals – “balance,” “harmony,” and so on – remains the same. In his famous \textit{Republic}, Cicero stipulates the following:

\begin{quote}
Just as with string instruments or pipes or in singers’ voices a certain harmony of different sounds must be maintained [...] and as that harmony, though arising from the management of very different notes, produces a
\end{quote}

\begin{footnotes}
\item[75] Ibid at 6.
\item[76] Marcus Tullius Cicero, \textit{Treatise on the Commonwealth in Francis Barham, Esq., The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws, translated from the original, with Dissertations and Notes in Two Volumes, Vol. 1 (London: Edmund Spettigue, 1841)}
\item[77] Digest of Justinian 43.16.3-9, 291 (Alan Watson ed. 1985). “Those who do damage because they cannot otherwise defend themselves are blameless... It is permitted only to use force against an attacker and even then only so far as is necessary for self-defense.”
\item[78] See Augustine, The City of God, chapter 7, http://www.newadvent.org/fathers/120119.htm. Augustine discusses just war theory but does not use the term proportionality (between force and threat). He does however use the term “just war”. This seems to be the first use of the signifier “just war” (certainly it is one of the earliest).
\end{footnotes}
pleasing and agreeable sound, so a state, by adjusting the proportions between the highest, lowest, and intermediate classes, as if they were musical notes, achieves harmony. What, in the case of singing, musicians call harmony is, in the state, concord.\footnote{N Wood, Cicero’s Social and Political Thought (Berkeley: University of California Press, 1988) at 69.}

On another occasion, Cicero describes law as the \textit{recta ratio naturae congruens}\footnote{Cicero, De Republica} — meaning the right ratio, the proper proportion. This concretization is further refined by Aquinas in the law of self-defense of states.\footnote{Thomas Aquinas, \textit{Summa Theologica}, Second Part of the Second Part Q. 40 (Benziger Bros. ed. 1947), http://www.ccel.org/a/aquinas/summa/SS.html.} Aquinas presents the first reconstruction of Aristotle’s concept into the now known multi-step proportionality procedure.\footnote{That is, that the reviewing court must consider: (1) whether the measure was suitable to achieve the desired objective; (2) whether the measure was necessary for achieving the desired objective; and (3) whether, even so, the measure imposed excessive burdens on the individual it affected.} It resembles the modern account of proportionality’s argumentation framework so strikingly, that I intend to provide his thesis in full, as summed up by Eric Engle:\footnote{Eric Allen Engle, “The History of the General Principle of Proportionality: An Overview” (2012) 1 at 5.}

In the law of self-defense, there are conditions that must exist for the use of force to be just; force must be necessary, and force, when used, must not be excessive – it must be proportional - it must be exercised by the sovereign according to rules.

Aquinas's theory on proportional self-defense, in turn, came to be seen as a general principle of law by Grotius.\footnote{Hugo Grotius, \textit{The Rights of War and Peace}, including the Law of Nature and of Nations, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill, Introduction, § 62 (1901) , http://oll.libertyfund.org/title/553/90737/2052898 on 2009-03-08. “The Law of Nations does not consist, therefore, of a mere body of deductions derived from general principles of justice, for there is also a body of doctrine based upon consent.”} The principle would apply not just to states in their mutual relations, but also to individuals in their mutual relations. Grotius thus
transitions the concept into modernity and links the idea of justice as proportion (ratio) to the idea of interest balancing as a method for dispute resolution.\textsuperscript{87}

As Aharon Barak describes it, the development of the concept of proportionality is also inexorably linked to the Enlightenment of the eighteenth century and the notion of social contract.\textsuperscript{88} Shifting paradigms in understanding the relationship between citizens and their rulers manifest a new societal development - the notion that it was citizens who provided their rulers with powers – limited powers – and that those powers were granted, and legitimately deployed, only used for the people’s, not the rulers. Such ideas were embodied in the notion of the liberal state, the proponents of which espoused a wide array of views but generally supported ideas of free and fair elections, civil rights, freedom of the press, freedom of religion, free trade, and private property.\textsuperscript{89} At the core of the liberal state theory, though, is the notion that not every purpose which serves the public interest is justified when it also limits fundamental human rights.\textsuperscript{90}

A product of interpretation of Platonic and Cicerian theory, the modern articulation of the proportionality concept (Verhältnismäßigkeit) was first applied in mid-18th century Prussia, as the law was codified on \textit{Rechtsstaat} (a state “governed by law”) lines, and refined by the German courts in the 19th Century.\textsuperscript{91} According to most German commentators today, it was Carl Gottlieb Swayne (1746-1798) who,
more than anyone else, contributed to the development of proportionality. Svarez notes, as per the principal tenets of the Enlightenment, that the state may only deprive the liberty of one subject in order to guarantee the freedom and safety of another or others. Alec Stone Sweet and Jud Mathews provide the translation of his treatise, *Lectures on the State and Law*, where Svarez not only describes the balancing exercise, but also insists that it should proceed with a thumb on the scale in favor of rights:

Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail. . . . The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.

As opposed to Svarez’ ideal social notion, as a *positive legal concept* proportionality may be traced to Prussian administrative law of the second half of the 19th century. Alec Stone Sweet and Jud Mathews observe that throughout the nineteenth century, scholars continued to reiterate and refine proportionality-based standards for the exercise of police power, and these ideas were finally given agency with the establishments of administrative courts. Under Friedrich Wilhelm III,

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92 For an overview of the pertinent literature, see Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 177.
95 Alec Stone Sweet & Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47:1 Colum J Transnat’l L 72 at 91. As the scholarly discussion of proportionality appears to well anticipate its doctrinal articulation it is worth quoting the following passage from the above piece,
successor of enlightened rule of Friedrich the Great, the law was codified to include a provision that “the police [are] to take only the necessary measures for the maintenance of public peace, security, and order ...”. To be more specific, Article 10(2) of the *Allgemeines Landrecht* of 1794 authorized the government to exercise police powers in order to ensure public peace. However, at the same time, it also limited those powers to such measures which were essential for achieving that goal. As Moshe Cohen-Eliya and Iddo Porat put it:

> It is clear, both from the language of this provision and from its underlying logic, that this was a reversal of the default rule by which state action was legitimized under German public law. If in the past state action had been held to be valid, even when it was not explicitly permitted under the law, henceforth the validity of such action depended on explicit textual authorization.

An explicitly articulated concept of proportionality was first endorsed by Prussia’s Oberverwaltungsgericht, or Higher Administrative Court, which began operating in 1875. In a long line of cases, the court ruled that police conduct was illegal because it was disproportional. Interestingly enough, there appear to be two different, and indeed contradictory, lines of reasoning which seek to account for the

where the authors offer an alternative account of proportionality’s German roots: “Perhaps the most significant figure in the mid-nineteenth century was Robert von Mohl, whose concepts of “objective disproportionality” and “subjective proportionality” anticipated proportionality in the narrow sense and the necessity principle, respectively. While von Mohl built on the work of earlier jurists, he grounded proportionality not in natural rights theory, as Suarez had done, but in rule of law concepts.”


Ibid at

More accurately, though, the Court was employing the “necessary measures” clause of the Article 10(2) of the *Allgemeines Landrecht* of 1794 (cited above) to annul police measures on least restrictive means grounds.
invocation of such proportionality. Per the first explanation, the tendency of Prussian administrative courts to focus on proportionality was in line with formalistic German legal science which was deeply imbedded in the legal tradition. On an account offered by Moshe Cohen-Eliya and Iddo Porat, the German law scholars of the time, headed by Savigny, often borrowed from the natural sciences in order to exemplify the logic of the law and the systematic way in which legal rules are created and function. For example, in the same way that one can derive the length of one side of a triangle from the lengths of its two other sides, one can also derive (so they claim) any missing rules from the existing rules of law. Proportionality, thus, unlike ad hoc, intuitive, and highly partisan balancing, “was a prerequisite for improving the administration and making it more effective, and this improvement could be achieved by focusing on the means-ends nexus”.

Odd as it may sound, in parallel with this formalistic discourse, the development of the concept of proportionality was also seen as a counter-formalistic movement, that is, the move from the jurisprudence of concepts to the jurisprudence of interests. The proponents of the latter, notably von Jhering, viewed law as a domain whose purpose is to settle conflicts between competing interests by way of balancing; he further viewed judging as a creative activity heavily influenced by judges’ personalities. Addressing the American jurisprudence of the time, Alexander Aleinikoff likewise draws a parallel between predisposition of courts to

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101 Ibid.
balancing – which is at the core of proportionality – with the tendency to move away from judicial formalism:

[B]alancing was a major break with the past, responding to the collapse of nineteenth century conceptualism and formalism as well as to half a century of intellectual and social change. ... Flying the flags of pragmatism, instrumentalism and science, balancing represented one attempt by the judiciary to demonstrate that it could reject mechanical jurisprudence without rejecting the notion of law.104

Despite the uncertainty of its true origins, the development of proportionality in 20th century Germany, as Aharon Barak points out, continued well into the beginning of the 1930s. It continued throughout the Weimar Republic, and ended with the rise to power of the Nazi party when “[l]abeling a state measure ‘political’ was usually enough to shield it from judicial review”.105 Following the tendency to subject a state’s actions to judicial review after the Holocaust, however, proportionality was finally constitutionalized by the mid-20th century. The German Basic Law of 1949 established the Federal Republic – a new constitutional order grounded in a commitment to human rights enforceable as higher law106 – and created a constitutional court, upon which was conferred jurisdiction to defend those rights. Immediately, jurists began arguing for the recognition of proportionality as a constitutional principle.107 By the late 1950s, proportionality had assumed its

107 It is of important note that the Basic Law for the Federal Republic of Germany does not contain any explicit provisions relating to proportionality.
present four-stage form and by 1963, the court declared that it would be applied to all cases.\textsuperscript{108}

Thus, in sum, the concept of proportionality evolved from a prohibition of disproportionality (Uebermassverbot) (the state must not act too broadly) toward a more clearly defined and restrictive principle that the state must use proportional means to legitimate ends (Verhaeltnismaessigkeit) in the post-war era.\textsuperscript{109} The principle took further hold in continental Europe and was then taken up by the European Court of Human Rights upon its founding in 1959, and later by the fledgling European Community as a conceptual “meta principle of judicial governance” by a number of other states and by various international regimes, most notably the European Convention on Human Rights, the European Community, and the World Trade Organization.\textsuperscript{110}

In English law, the impetus behind the adoption of the proportionality test came directly from European sources, predominantly the jurisprudence of the European Court of Justice and the European Court of Human Rights (ECtHR). Elsewhere in the common law world, the importation of the principle from continental European sources is less direct but just as clear. In New Zealand’s case, for instance, the principle was imported from Canada. Be that as it may, proportionality has been absorbed into Commonwealth systems (Canada, South Africa, New Zealand,) and, via European law, the U.K. Indeed, it is also presently making inroads into Central and South America. As argued by Stone Sweet &


Mathews, by the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis.\textsuperscript{111}

In 1999, the principle of proportionality was incorporated into the EU Amsterdam Treaty. Article 3 of the EU Amsterdam Treaty states: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” In addition, this is also explicitly referred to in Protocol (30) on the application of the principles of subsidiarity and proportionality annexed to the Treaty on the European Union and to the Treaty establishing the European Community: Each EU institution shall also ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

At this point it is logical to ask the question, ‘what are the reasons for proportionality to spread across jurisdictions?’ As Vlad Perju puts it, the range of available accounts spans the entire spectrum, from cold realism to an idealism of sorts.\textsuperscript{112} For Mattias Kumm, proportionality is justified by a conception of legal legitimacy which is based on the ability of the state to demonstrate to its subjects the reasons and justifications for its actions - a process that Kumm terms “Socratic Contestation.” According to this conception, the courts, using proportionality, push the government to constantly provide a logical basis, and coherent reasons for its actions, which are crucial for the legitimacy of those actions.\textsuperscript{113}

\textsuperscript{111} Ibid at 74.
Similar to such a perspective is a submission by Moshe Cohen-Eliya and Iddo Porat, who have recently argued that proportionality:

is essentially a requirement for justification, which represents a profound shift in constitutional law on a global level. We characterize this, following South African scholar Etienne Mureinik, as a shift from a culture of authority to a culture of justification. At its core, a culture of justification requires that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e., in terms of proportionality.114

Frederick Schauer, in seeking to account for the widespread acceptance of proportionality around the globe, stresses that, with the exception of the United States, constitutional systems with judicial review are relatively recent creations, the product of post-WWII developments. As a result, he argues, constitutional jurisprudence in such systems is still developing, and the amount of doctrine and case law is relatively light. In these early stages of legal development, standard-based doctrines such as proportionality are more appropriate than categorical ones, as they allow for the doctrine to develop naturally, and avoid constraining it in advance.115

It is worth noting that, later in his text, Schauer goes a step further and provocatively argues that, as European constitutional law matures over time, it will develop the same rule-like structure which characterizes the more mature American constitutional system116 (the latter will be examined in more detail in the second

115 Ibid.
chapter of the thesis.) That being said, the thorough historical and cross-border assessment of proportionality reveals that what we are witnessing is not a convergence, but “a much more complex set of phenomena encompassing both fundamental similarities and profound differences”.

1.3. The Nature of Proportionality: What's in a Name?

It is safe to assume that, although proportionality means different things in different contexts at different times, a general explanation of its nature would presuppose that all or at least most of these different concepts of proportionality have something in common – that there is a concept of proportionality. A first clue might lie with the fact that term ‘proportionality’ is derived from the Latin phrase pro portio, in equal shares, thus indicating a concern with the distribution of some kind of equal weight to various interests.

Moving to the constitutional context, proportionality is typically defined as a set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible. At its foundation is the requirement of the existence of proper relations between the benefit gained by the limiting law and the harm caused by it. Proportionality thus provides a legal standard against which individual or state measures can be

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119 The current literature states that the simplest formula to explain proportionality is that “one should not use a steam hammer to crack a nut, if a nutcracker would do” (R v Goldstein (1983) 1 WLR 151 at 155 (UKHL).
reviewed.\textsuperscript{120} It also provides a “relatively systematic, transparent, and trans-substantive doctrinal structure for balancing”.\textsuperscript{121} Moreover, proportionality equally denotes a “legal technique”, “legal construction,” and “methodological and interpretive tool”.\textsuperscript{122} As Mads Andenas & Stefan Zleptnig observe, in ECHR law, for instance, proportionality is applied to at least three different contexts: first, as a benchmark to establish the legality of derogations; second, with the aim of establishing the legality of interferences by states with Convention rights; and, third, to determine the scope of application when it comes to certain rights established by the Convention.\textsuperscript{123} It is worth noting that there is also a distinction between proportionality as a standard for decisions (directed at the requirements placed on the \textit{original decision-maker}) and proportionality as a standard of review (directed at the role of the \textit{reviewing court}).\textsuperscript{124} For the purposes of the present study I will use proportionality in the above senses interchangeably, although once again I shall reiterate that proportionality is a protean and mercurial concept which has many facets and may denote different things in different contexts at different times.\textsuperscript{125}

By the same token, the very core of proportionality – proportionality \textit{stricto sensu} – is not without problems of its own. Indeed, in order to show that “proportional” relationships exist between means and ends of the impugned

\textsuperscript{125} For a similar account, see, Jacco Bomhoff, “Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law” (2008) 31 Hastings Int & Comp L Rev 555.
legislation, one would inevitably have to recourse to the concept of “proportional”, which is not easily defined. As such, traditional definitions of proportionality simply tell us that the concept we do not understand (“proportionality”) is defined by another value-laden concept (“proportional”) which cannot be defined.

Having said that, at the level of general propositions, as distinct from precise wordings and formulations, most mainstream accounts of proportionality appear to be premised upon one of two different notions. The first one, which seems to dominate modern discourse, conceptualizes proportionality as relating to the “fit” between means and ends, treating it as a technical judicial inquiry: “is there a sufficiently tight fit between the means and the end?”

A second conception of proportionality is a particularized “weighing” of human rights against collective goals that might justify their limitation: “there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right”.

Underlying the latter notion is the idea of “weigh[ing] the competing interests” or the requirement that “[a] balance between the two competing concerns must be found”.

On the one end of the spectrum, then, we see the “appearance of legalistic constraint” informed by the orthodox assumption that proportionality, once

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127 Egan v Canada 2 SCR 513 at 605. The notion of proportionality is articulated in a different way by McLachlin J (as she then was) in RJR-MacDonald: “Proportionality between the effects of the legislation and the objective,” as she puts it, presupposes “balancing the negative effects of the infringement of rights against the positive benefits associated with the legislative goal” (RJR-MacDonald v Canada [1995] 3 SCR 199 at para 175.)
translated into the stringent means/ends analysis, provides for greater certainty as to the outcome of a constitutional dispute. Michael Fordham and Tom de la Mare articulate this notion as involving the assessment of costs and benefits: “So, if prevention of rape is a permissible aim (legitimacy), which can (suitability) and can only (necessity) be furthered by forced castration, the question is then one of overall cost and benefit (means/ends fit”).

On the other end of the spectrum is a commitment to the somewhat ambiguous language of “balancing” (most emphatically propounded by German commentator Robert Alexy) and open admission — regretfully, more and more inconvenient to say out loud in academic milieus — that human rights adjudication necessarily involves normative judgments and some sort of weighing individual constitutional interests against public concerns. Regarding this “inconvenience,” proportionality appears to be a victim of its own success. Inasmuch as its theoretical treatment is currently inundated with large metaphors and loud statements — proportionality is acclaimed as, among other things, a “universal criterion of

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132 Consider, for the sake of an example, the following passage from George Letsas’ account of proportionality:
132 It is wrong to think that the limitation clauses of the ECHR open the door to an abstract balancing exercise between the various conflicting interests that are involved. The point of the limitation clauses is to invite the court to identify which principle justifies the right in question and to examine whether that principle applies to the applicant’s case. For example, the value of democracy requires that we are free to express ideas and to try and convince others about their plausibility. This freedom is a necessary condition for the legitimacy of imposing the outcome of elections on individuals. This principle applies to religious speech as much as it does to political speech. It is therefore unprincipled to protect the expression of political ideas that shock or offend but censor speech which offends religious beliefs (George Letsas, A Theory of Interpretation of the European Convention on Human Rights (OUP: Oxford, 2007) at 14.)
constitutionality” and “the ultimate rule of law”\textsuperscript{133} — any account that recognizes its inherent normativity, and thus fall shorts of portraying it as ensuring technical and scientific objectivity, tends to be excluded from the domain of orthodox jurisprudence. The foregoing objectivity, however, is illusory.\textsuperscript{134} Robert Alexy holds that, in constitutional adjudication, balancing is unavoidable because “there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right”.\textsuperscript{135} Elaborating on the balancing metaphor, Raz uses the language of weight to impart intelligibility to the difficult and abstract concept of acting on the balance of reasons.\textsuperscript{136} Illustrative in this respect is the decision of the European Court of Human Rights in \textit{Cossey v UK} involving transsexual applicants. In the words of the ECtHR:\textsuperscript{137}

The applicant also prayed in aid Article 14 (art. 14) of the Convention, which prohibits discrimination in the enjoyment of the rights and freedoms guaranteed. However, the Court does not consider that this provision assists her. She appears to have relied on it not so much in order to challenge a difference of treatment between persons placed in analogous situations (see, amongst various authorities, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 26, para. 60) but rather as a means of introducing into her submissions the notion of proportionality between a measure or a restriction and the aim which it seeks to achieve. Yet that notion is already encompassed within that of the fair balance that has to be struck between the general interest of the community and the interests of the individual.

\textsuperscript{133} David M Beatty, \textit{The Ultimate Rule of Law} (New York: Oxford University Press, 2006) at 162.
\textsuperscript{134} Joel Bakan, “Constitutional Argument: Interpretation and Legitimacy in Canadian Constitutional Thought” (1989) 27:1 Osgoode Hall L J 123 at
\textsuperscript{136} George Letsas, \textit{A Theory of Interpretation of the European Convention on Human Rights} (OUP: Oxford, 2007) at 14.)
\textsuperscript{137} \textit{Cossey v United Kingdom} (1990) 13 EHRR 622.
Admittedly, both approaches to articulating proportionality get a lot right. Joel Bakan, by situating the arguments in the context of the debate over the formal grounds for the legitimacy of judicial interference with legislative decisions, posits that the “means/ends fit” notion is ultimately grounded in the theory of constitutional truth as a legitimizing source of judicial review (underlying this thesis is the idea that proportionality, and particularly its “rational connection” and “necessity” steps, constrains judges and allow them to identify “true” answers to hard constitutional questions),\(^{138}\) whereas the “balancing” notion, which contrasts sharply with the means/ends analysis and openly acknowledges that judges, like other policy-makers, must balance competing interests and consider the probable consequences of deciding one way or the other, correlates with the so-called “trust” thesis. As per the latter, judicial review is considered legitimate on the ground that judges can be trusted to balance competing interests impartially and reasonably because of their personal qualities and institutional role.\(^{139}\)

A useful starting point to getting the distinction between “means/ends fit” and “balancing” arguments conceptually and analytically correct, in my opinion, is to consider how both proportionality’s representations treat judicial considerations that do not fit the traditional legalistic account of law. Can proportionality reasoning

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\(^{138}\) In more elaborated form, the thesis maintains that “judges are constrained by the constitution to reach legally correct answers to particular constitutional questions. They do not, therefore, substitute their policy choices and preferences for those of elected officials. Such arguments acknowledge that when judges make decisions under the constitution, they exercise power - they use the power of the court, and therefore the state, to condone or rearrange existing social and legal relations - but they portray the exercise of such power as legitimate because it is required by the constitution” (Joel Bakan, "Constitutional Argument: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27:1 Osgoode Hall L J at 124).

eschew value laden judgments? Can it allow judges to ascertain the answers to legal questions by an essentially mechanical process, that is, by linking together legal and empirical considerations so that they necessarily “fit”?

David Beatty emphatically argues that it can. Sympathetic to the notion of the means/ends “fit,” he places great faith in the power of facts underlying particular constitutional disputes. Elaborating on this thesis in *The Ultimate Rule of Law,*¹⁴⁰ he maintains that proportionality can guarantee judicial objectivity so long as the focus of review is on the means and effects of the law, rather than on “balancing.” Is the law under- or over-inclusive? Are there less restrictive means available to pursue the objective? By turning such legal questions — which invite wide judicial discretion — into factual questions, as Beatty describes it, the proportionality inquiry becomes, he argues, “an empirical one of establishing whether there are better policy alternatives than the law the government chose to enact”.¹⁴¹

Others have echoed Beatty’s point by stressing that the means/ends analysis in proportionality reasoning in an attempt to eschew the “balancing” component of the test altogether.¹⁴² Peter Hogg used to argue,¹⁴³ for example, that once the assessment of harm and benefit caused to the rights in question has been carried out within the components of proportionality that deal with the means/ends relations of the impugned law,¹⁴⁴ weighing of individual rights and corresponding public interests is

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¹⁴² See section 1.4 for a wider account of the components of proportionality test.
¹⁴³ It is of note that he has subsequently reconsidered his approach.
¹⁴⁴ The inquiry in question is mostly completed within the first three stages of proportionality test, namely, proper purpose, rational connection, and necessity.
no longer required. That is likely why Hogg argued the “balancing step of proportionality analysis has become irrelevant” in the jurisprudence.\textsuperscript{145} He stated that:

If the objective is sufficiently important, and the objective is pursued by the least drastic means, then it must follow that the effects of the law are an acceptable price to pay for the benefit of the law. I conclude, therefore, that an affirmative answer to the first step—sufficiently important objective—will always yield an affirmative answer to the fourth step—proportionate effect.\textsuperscript{146}

Martin Luteran makes the case for avoiding the terminology of balancing and portraying proportionality as the proportion between means and ends, whilst adopting the interest-based theories of rights propounded by Raz and Finnis.\textsuperscript{147} Luteran argues that the language of balancing should be abandoned, since it gives rise to a prevalent and unhelpful understanding of proportionality as a cost-benefit analysis when instead the courts are assessing the proportion between ends and means of state action.\textsuperscript{148}

On the face of it, the notion of proportionality as a technical means/ends “fit” is easy to subscribe to, for it is ubiquitously embodied in the parlance of most constitutional tribunals. The Supreme Court of Canada, as an emblematic example, readily employs the language of “the degree of required fit between means and ends”.\textsuperscript{149} Yet another appeal of the notion comes from the fact that, as has been stated

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147 Martin Luteran, Some Issues Relating to Proportionality in Law and Ethics, with Special Reference to European Human Rights Law (DPhil, Oxford University, 2009) at 260.
\end{flushright}
above, it creates an appearance of scientific objectivity in human rights reasoning and provides a relatively incontestable legal foundation for judicial review.

Notwithstanding these signs of acceptance, however, it is undeniable that something is amiss with the “means/ends fit” argument, especially when we attempt to reconcile it with the normative considerations that necessarily underlie every constitutional dispute. Consider the following example. In *Handyside v United Kingdom*, in one of the most famous quotes from its case law, the European Court of Human Rights posits that freedom of expression is:

> [A]pplicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to *those that offend, shock or disturb the State or any sector of the population*.\(^ {150}\) Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.\(^ {151}\)

While most commentators tend to scrutinize — and praise — this passage in isolation, it is instructive to notice that further in the same judgment the court added that freedom of expression “is subject to paragraph 2 of Article 10” which means that “every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued”.\(^ {152}\) Among the aims established in paragraph 2 is “protection of public morals.” In *Otto-Preminger-Institut v Austria* the European Court has interpreted this to include the right “not to be insulted in [one’s] religious feelings by the public expression of views of other persons”,\(^ {153}\) moving on to apply a test of proportionality. As George Letsas rightly inquires, is this

\(^{150}\) Emphasis added - I.P.

\(^{151}\) *Handyside v United Kingdom* (1979–80) 1 EHRR 737 at para 49.

\(^{152}\) Ibid.

interpretation compatible with the demands of pluralism, tolerance, and broadmindedness, without which there is no ‘democratic society’? How can one be said to have the right to offend, shock, or disturb when this right is subject to the rights of others not to be offended, shocked, or disturbed? Or is it that we have a right to shock and offend others, so long as we do not offend too much or we do not offend too many? On this interpretation, it seems implausible to assume that the said constitutional dispute can be framed in the limited terms of a means/ends analysis — the considerations involved are clearly of a value laden nature. The problem with the rhetoric of “means/ends fit” in the context of proportionality, therefore, is that it can obscure the normative considerations at the heart of human rights issues and thus, as Andrew Legg describes it, “deprive [...] society of a moral discourse that is indispensable”.

A further difficulty with avoiding the balancing stage of the proportionality test in constitutional reasoning is that it may lead to failure to get the issue at hand right. Imagine the law allows the police to shoot a person to death if this is the only means of preventing a perpetrator from destroying property. Protection of property certainly is a lawful, even an important, purpose. Shooting a perpetrator to death is a suitable means of preventing him from destroying property. Since the shooting is allowed only if no other means are available, the necessity test of the second step is also passed. If one had to stop here, the balance between life and property could not

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155 Ibid.
be made. The law would be regarded as constitutional, and life would not get the protection it deserves. As Julian Rivers rightly observed:

It is vital to realise that the test of balance has a totally different function from the test of necessity. The test of necessity rules out inefficient human rights limitations. It filters out cases in which the same level of realisation of a legitimate aim could be achieved at less cost to rights. By contrast, the test of balance is strongly evaluative. It asks whether the combination of certain levels of rights-enjoyment combined with the achievement of other interests is good or acceptable.

Espousing the same thesis, in Canada (Attorney General) v JTI-Macdonald Corp, the Supreme Court of Canada took pains to repudiate the view that the proportionality test can be done without the balancing stage, confirming that it considered balancing to be essential to rights review under the Charter:

Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.

Likewise, in Alberta v Hutterian Brethren of Wilson Colony, McLachlin CJ suggested that “rather than reading down the government’s objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of Oakes” and Abella J stated that

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159 Canada (Attorney General) v JTI-Macdonald Corp, 2007 SCC 30 para 46.
“most of the heavy conceptual lifting and balancing ought to be done at the final step”.\textsuperscript{160}

To sum up, the present section has looked at two ways of articulating what is applied by the constitutional tribunals worldwide as the proportionality principle: proportionality as a “means/ends fit” and proportionality as a principled “weighing” of all relevant considerations. The difference between these arguments, in my submission, is not simply terminological; it is of practical, as well as philosophical, significance. It demonstrates the impotence of all theories of proportionality that treat it as a mere means/ends fit and thus avoid the inevitable normative judgments in adjudicating human rights. Whilst designed as a constraint-based argument,\textsuperscript{161} the “means/ends fit” approach to human rights reasoning easily becomes a Procrustean bed, as it jettisons all considerations that do not fit under the rubric of “law” or “facts.” The balancing element of proportionality, on the other hand, being openly normative, allows judges to take into account all relevant considerations — including those of a value laden nature — and appropriately demands that less important governmental objectives not outweigh severe impairments of constitutional rights.

Limiting proportionality to means/ends fit is self-deceptive at best and misleading at worst. Whatever headings we attribute to the proportionality concept, it makes little to no impact upon the substance of the test — proportionality cannot do without balancing. By way of illustration, consider the following diagram where I seek to demonstrate that in conducting a proportionality analysis, there is positively no way around balancing, that is, explicit weighing of individual rights and public

\textsuperscript{160} Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 [Wilson Colony] at para 149.

\textsuperscript{161} Joel Bakan, "Constitutional Argument: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27:1 Osgoode Hall L J 123 at 126.
interests. The measures chosen — as well as their deleterious and salutary effects — are not only examined in relation to the purpose they seek to achieve; they are also assessed in relation to constitutional rights:\footnote{162 The formula also demonstrates that the only proportionality sub-test that can be “abandoned” without encroaching upon the logic of the structured analysis is “minimum impairment” test. As has been suggested above, some constitutional tribunals indeed conduct proportionality analysis avoiding entering this limb of the test.}
surrounding findings of difference”. Indeed, Thomas Poole echoes this point by stating that “to talk about proportionality is to presuppose a jurisdiction in which it is to operate. Proportionality reaches out, demanding a defined political space in which the balancing is to take place”. For example, where a court in one jurisdiction speaks of a principle of proportionality (Germany) and a court in another setting of a proportionality test (U.S.), there is a distinct possibility that the difference between principle and test says more about these two legal systems than the two invocations of an idea of proportionality. Similarly, in the German context, and in references to Interessenabwägung (balancing of interests) and Wertabwägung or ‘Güterabwägung (balancing of values) the differences in the chosen parameters — values vs. interests — may be more significant than the invocation of balancing.

Alongside the difficulty in generalizing about proportionality across legal cultures and traditions (the horizontal dimension,) we should be mindful of the many pitfalls in generalizing about proportionality in the vertical dimension — as it develops and transforms over time. This latter phenomenon is particularly traceable in jurisdictions where proportionality has an extensive history of dominating constitutional review; the Canadian example in this respect is incontrovertible.

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Although it is not clear what has animated the Supreme Court of Canada’s retreat from *Oakes* — some invoke the argument about the lack of “institutional competence and expertise” in a number of issues,\(^{167}\) while others muse about an inevitable transition to a “rigid bureaucratic rationality” anticipated by Max Weber\(^ {168}\) — beyond dispute is the fact that generalizing about the proportionality test in Canadian legal discourse is problematic. Back in 1987, Robin Elliot espoused a view which still rings true: “[t]he prospect that we will see a single, uniform approach to s. 1 emerging from the Court in the foreseeable future is dim indeed”.\(^ {169}\) One might be tempted to object that it is an axiom of our times that as our world is rapidly changing — so does law. However, as Sujit Choudhry rightly observes, whilst *Oakes* stated that “the nature of the proportionality test will vary depending on the circumstances”,\(^ {170}\) the test in *Oakes* itself was framed in abstract terms “which did not invite courts to differentiate its application in future appeals that might differ radically from *Oakes* itself, either with respect to the rights at play or the policy context”.\(^ {171}\) Underlying this latter argument is a concern that, as Peter McCormick admonishes, the variations in the judicial interpretation with a strong emphasis on contextualism and policy


\(^{169}\) Robin M Elliot, “The Supreme Court of Canada and Section 1 — the Erosion of the Common Front” (1987) 12 Queen’s L J 277 at 340.

\(^{170}\) *R v Oakes* [1986] 1 SCR 103 at 139.

implications sometimes look as if “the Court is holding legislation valid or invalid on the basis of standards which it is making up as it goes along”.  

Yet another possibility of doctrinal diversity in application of the proportionality test relates to what Daniel Solove has succinctly termed “the darkest domain” — intersection of proportionality and deference and (what amounts to the reverse side of the same coin) variable intensity of review. Notwithstanding the fact that there is no accepted legal definition of the term deference — more than that, a growing number of proportionality advocates question the very fact that the term is appropriate in the human rights context — the debate in this area of constitutional law remains vibrant. The doctrinal embrace of proportionality on a worldwide scale raises the question of whether the judiciary is the body to be entrusted with the tasks associated with value-laden judgments. Against this backdrop, the invocation of the doctrine of deference appears to be a logical — even inevitable — response to the counter-majoritarian anxiety.

As Mark Elliott observes, there are two ways in which deference operates across jurisdictions (though, in my submission, one may assume the possibility of two approaches to be applied in the same jurisdiction concurrently.) One option is

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176 Aharon Barak, for instance, espouses a view that “[t]he approach that a judge should defer to legislative or executive branches does not fit a constitutional democracy” (Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 399). See also the dictum of Lord Hoffmann in R (ProlifeAlliance) v British Broadcasting Corporation [2003] UKHL 23.
177 Some claim, however, that the precondition for the invocation of deference is the lack of institutional ability of the courts (on the relevant analysis, see section 3.1 of this thesis.)
that the questions the court asks of the decision-maker are rendered less demanding.\textsuperscript{179} Alternatively, the court might pose the questions in their most rigorous form, but may make it easier for the decision-maker to satisfy the court that the answers are such as to render the measure lawful.\textsuperscript{180}

The application of deference by the rights-protecting courts has stimulated a number of criticisms. At the forefront of the debate is the claim that deference is not warranted by any constitutional instrument; it is asserted that, on the contrary, it stands in sharp contrast to the notion of the separation of powers. Furthermore, the attempts of the courts to calibrate the degree of deference according to the context of each and every case trigger another concern, namely, how to account for the absence of any meaningful — and, most importantly, consistent — doctrinal anchor for the invocation of deference. As the rights-protecting courts often do not follow their own precedents, most distinctions and explanations suggested by commentators are quickly rendered unsustainable. With respect to the application of deference by the Supreme Court of Canada, Sujit Choudhry puts it as follows: \textsuperscript{181}

\begin{quote}

in the decade following Oakes, the Court searched for criteria of deference, to reliably and predictably categorize cases where deference was warranted and those where it was not. These categories were not applied consistently by the Court, and, indeed, produced disagreement within the Court over how they should be applied in specific cases. Underlying both trends were concerns regarding the cogency of the distinctions employed by the Court to delineate the boundaries of these categories.
\end{quote}

\textsuperscript{179} Consider how in Edwards Books (\textit{R v Edwards Books & Art Ltd.}, [1986] 2 S.C.R. 713) the Supreme Court of Canada has mitigated the \textit{Oakes} standard, stipulating that the challenged measure need only impair Charter rights "as little as is reasonably possible" and asking "whether there is some reasonable alternative scheme," as opposed to whether the measure chosen was the least restrictive mean.

\textsuperscript{180} For the sake of example, consider how the Supreme Court of Canada address the empirical questions arising out of Charter claims.

\textsuperscript{181} Sujit Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34:2 Supreme Court L Rev 501 at 503.
Returning to the discussion on the “proportionality language,” it is important to note that judges in a particular jurisdiction may very well be engaging in a thought process that, if asked, they would themselves describe as balancing or proportionality when deciding cases, without ever using any of these terms in official judicial discourse.\textsuperscript{182} They might also invoke alternative terminology, such as “means/ends rationality,” a “least restrictive means test,” or approaches based on Optimierung — optimization — or praktische Konkordanz — practical concordance.\textsuperscript{183} It is likewise important to bear in mind that the European Court of Human Rights typically exercises the proportionality test under the heading “fair balance”.\textsuperscript{184}

Against this background, the following conceptual indicia of proportionality may be discerned:

- Proportionality analysis can be understood as a conceptual framework, an analytical methodology and a legal construction that defines the relationship between human rights and those considerations that may justify their limitations in democratic settings.\textsuperscript{185}

- Wherever the proportionality test has been introduced, it has the same basic two-stage structure. The first stage is to establish that a right has been infringed by

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\textsuperscript{182} Or even extra-judicially. The tradition of judges giving extra-judicial accounts of their work, while not exclusively an Anglo-American phenomenon (see, e.g., the work of judge, and professor, Aharon Barak), is certainly not prevalent everywhere.


governmental action. In the second stage the government needs to show that it pursued a legitimate end and that the infringement was proportional.

- Proportionality, as many commentators submit, is a technique of last resort. Should there be ways to avoid the constitutional conflict by means of, for instance, constitutional or statutory interpretation, that is preferable.

- The proportionality principle is not expressly contained or referenced anywhere in the text of a constitution – s36 of the South African Constitution perhaps comes the closest – but has been established by courts as the proper methodology for applying textual limitations clauses.186

- Proportionality constitutes a doctrinal underpinning for the global expansion of judicial power. Although there is significant variation in how it is used, judges do adopt the proportionality position themselves to exercise dominance over policymaking and constitutional development.187

- Proportionality at its core has a balancing framework, with private interests lying at one end of the spectrum, and public interests lying at the other.188

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188 This is but one articulation of the essence of balancing exercise. As a paradigmatic example, the European Court of Human Rights makes standard references to the need to “balance” individual rights and public interests (see, e.g., Sunday Times v. The United Kingdom (1979) App. No. 6538/74, 30 Eur. Ct. H.R. (ser. A) at para 6.) Interestingly enough, the Supreme Court of Canada maintains that public interests may occasionally appear at both ends of the scale: “[O]ne should not balance a private
- Proportionality deals only with those interests which are derivable from the body of relevant legal materials, as either being enshrined as constitutional rights or being inferable from the constitutional limitation provisions (which, notably, may establish a higher threshold for a public interest to qualify as legally protected, for instance, the ability to be “demonstrably justified in a free and democratic society”).

- There are many formulations of the proportionality test, as well as variations in the way in which it is applied across time and space. As such, a holistic model of conceptualizing proportionality should recognize the fact that its doctrinal contours may adopt different forms — and therefore be prepared to accommodate an array of differences in constitutional architectures and attitudes that lies beneath the surface of linguistic similarities.

1.4. Form and Substance: Decomposing Proportionality into Its Basic Elements

It is important to observe that proportionality as a standard for review is often conflated, or interchangeably used, with proportionality as a legal construction – that is, a formal structured argument.

interest, i.e. litigant x’s interest in his privacy against a public one, the public’s interest in an open court process. [...] Both interests must be seen as public interests, in this case the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process.” (Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326, the reasons delivered by Wilson J.).
While not without digressions, in its fully developed form the analysis involves four inquiries:

Q1 **Legitimacy.** Is the measure adopted to pursue a legitimate aim?
Q2 **Suitability.** Can it serve to further that aim?
Q3 **Necessity.** Is it the least restrictive way of doing so?
Q4 **Balancing.** Viewed overall, do the ends outweigh the means?

As I go on to explain, these components render the otherwise abstract notion of proportionality into what Aharon Barak calls a “usable concept” which stabilizes and sanctions a normative frame for rights disputes. Yet, another important observation is that this aggregate approach – which requires all four components in each case that a constitutional right is limited – has not been adopted by all legal systems which make use of proportionality.

There are two facets to this observation. The first is somewhat technical and revolves around nomenclature: by some constitutional tribunals, the “true proportionality test” is understood to include only the last three strands of analysis; the proper purpose component of the test is considered to be a standard on its own. This terminological issue, while not misleading or deceptive in the traditional sense, conveys an erroneous impression of leaving out the “legitimacy stage” of the analysis. I find it safe to assume that this is exactly what happened to the otherwise very

193 On the historical development of proportionality’s adoption in different jurisdictions, see Section 1.2 of this thesis.
meticulous analysis by Alec Stone Sweet and Jud Mathews where the authors claim that “[s]ome courts – including those of the EU, the ECHR, and the WTO, normally use only a three-part test, leaving out the “legitimate purpose” stage. The analysis is thus entirely focused on the relationship between means and ends”.¹⁹⁴ This is, of course, not a fully accurate observation. The need to pursue a “legitimate goal” is an important – and indispensable – component of proportionality analysis in the respective courts.¹⁹⁵

Similarly, in the touchstone of proportionality analysis under Canadian Charter – the Oakes test – what has been initially set out as a “proportionality analysis” included only the last three limbs of the orthodox formula.¹⁹⁶ The original nomenclature, is, once again, misleading, however, as is made clear in the following excerpt from RJR-MacDonald v Canada:

This Court in Oakes set out a test of proportionality that mirrors the elements of this idea of proportionality — first, the law must serve an important purpose, [emphasis added I.P.] and second, the means it uses to attain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of effects.¹⁹⁷

However, there are other, and more substantial, ways in which proportionality frameworks differ across different jurisdictions. These go beyond terminological issues and are concerned with what might best be described as the intensity of

proportionality review. Some legal systems, for example, adopt a so-called “softer” approach to proportionality and emphasize only three of the four components — such as proper purpose, rational connection, and a proper relation between the fulfillment of the purpose and the damage to constitutional rights. Others consider a pre-set, three stage proportionality test to be only a recommendation rather than a constitutionally mandated requirement and adopt a looser approach. The European Court of Human Rights, for example, applies the test in a “holistic” way, looking at the elements together, and, as Tom Hickman puts it, has never “clearly structured what it means by ‘proportionate’”. Similarly, the South African Constitutional Court which, despite relying heavily on the structured practice of the Supreme Court of Canada — as well as on, to a lesser extent, German constitutional law — does not necessarily adhere to the vertical proportionality formula. Article 36(1) of the

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198 As Aharon Barak has observed, this was the approach adopted in France. See Decision No 2007-555DC (August 16, 2007). Lately, however, it seems that the French Constitutional Court (The Constitutional Council) has adopted a new approach, requiring the necessary means test as well. See Decision No 2008-562 (February 21, 2008); Decision No 2009-580 (June 10, 2009).

199 See, for example, Silver v United Kingdom (1983) 5 EHRR 347.

200 Compare with the passage of the dissenting judge in Alberta v Hutterian Brethren of Wilson Colony: “The stages of the Oakes test are not watertight compartments: the principle of proportionality guides the analysis at each step. This ensures that at every stage, the importance of the objective and the harm to the right are weighed” (Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567, Abella J).


202 See, e.g., S Woolman & H Botha, “Limitations” in S Woolman, M Bishop & J Brickhill (eds), Constitutional Law of South Africa, 2nd ed (Cape Town: Juta Law Publishers, looseleaf 2002–), where the authors, in Chapter 34 (at 13) analyze the similarities between two systems’ limitation clauses: “Limitations analysis under the Charter and our Bill of Rights possesses such common features as [...] proportionality assessment which demands, at a minimum, that a rational connection exists between the means employed and the objective thought, that the means employed impair the right as “little as possible,” and that the burdens imposed on those whose rights are impaired do not outweigh the benefits to society that flow from the limitation.”


204 As Jonas Christoffersen puts it (in Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights (BRILL, 2009) at 35): “The principle of suitability [...] plays a less dominant role and the principle of necessity is reduced from the status as an
Constitution of South Africa stipulates constitutional review must “take[] into account all relevant factors”, including the proportionality test. This, by implication, means granting more discretion to the legislator.

Looser approaches to proportionality tests align with skepticism of structured analysis in constitutional adjudication, such as Jeremy Waldron’s. “The ability of judges,” Waldron writes, “to reason about rights is exaggerated when so much of the ordinary discipline of judging distracts their attention from direct consideration of moral arguments”. He then appears to go a step further claiming that “doctrines and precedents [can become] a distorting filter on the rights-based reasoning [...]”.

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205 The full text of the general limitation clause in Section 36 § 1 (former Section 33) stipulates the following: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose” (Constitution of the Republic of South Africa, Act 108 of 1996).

206 It is important to note that, as Canadian commentator Guy Regimbald observes, one might of course doubt whether there are any differences in practice between the two overall tests; the Canadian strictness being likely in practice to resemble more the South African flexibility than vice versa (Guy Regimbald, “Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review” (2005) 31 Manitoba Law Journal 239 at 267-269 and 274-267).


208 Ibid.
Yet another justification of the relaxed and undisciplined approach to proportionality — at least with respect to Strasbourg jurisprudence — is suggested by Danish commentator Jonas Christoffersen. As he writes:

> It is highly doubtful whether any pre-set proportionality-test could ever be developed. The principle of proportionality guides the interpretation and application of international and national law in vast fields of highly diverse and tremendously complex areas and it is counterintuitive to think that [...] rights adjudication can be reduced to a simple formula that can be applied to solve each and every dispute.²⁰⁹

Despite differences in rigour, style, and terminology, however, all proportionality formulas, as articulated by constitutional tribunals in different jurisdictions, actually have much in common. Comparative analysis reveals that in most jurisdictions, proportionality tests are similar content-based discursive 4-limb frames for norm-based argumentation, which differ primarily in terms of the intensity of review, and the level of scrutiny set out by each particular proportionality sub-test. Consider the following aggregated overview of proportionality frameworks across the most emblematic jurisdictions:

<table>
<thead>
<tr>
<th>Table 1: The structure of the proportionality test in comparative perspective.</th>
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<tbody>
<tr>
<td><strong>Sub-step 1: Proper purpose</strong></td>
</tr>
<tr>
<td>Germany</td>
</tr>
<tr>
<td>Canada</td>
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<tr>
<td>The ECtHR</td>
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<td>Israel</td>
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<tr>
<td>South Africa</td>
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<tr>
<td>Zimbabwe</td>
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<tr>
<td>Pressing and substantial governmental objective: of sufficient</td>
</tr>
<tr>
<td>The need to pursue a “legitimate aim”²¹¹</td>
</tr>
<tr>
<td>Purpose that is reasonable and necessary in a</td>
</tr>
<tr>
<td>A legislative objective which is sufficiently</td>
</tr>
</tbody>
</table>


²¹¹ The list of “legitimate aims,” as set out in the European Convention on Human Rights, is exhaustive.
importance to warrant overriding a constitutionally protected right and freedom

democratic society

| Sub-step 2: Rational connection | “Suitability” | The measures adopted must be rationally connected to the objective | An interference must “correspond to a pressing social need”

213 | Rational connection: the law must be rationally connected to the objective

214 | The relation between the limitation and its purpose | A rational connection found between the measures and the legislative objective

| Sub-test 3: Least restrictive means | “Necessity” | The measure should impair the rights “as little as possible” | Least drastic means: the law must impair the right no more than is necessary to accomplish the objective | Less restrictive means to achieve the purpose | The impairment of the right or freedom is no more than necessary to accomplish the

210 The criteria which must be satisfied for a government to pass the proportionality test are laid down in *R v Oakes* [1986] 1 SCR 103, with the Court being unanimous on the issue. It is important to note, however, that the factors to be considered in applying the Oakes test have frequently been reviewed, for instance in *RJR-MacDonald v Canada* [1995] 3 SCR 1, where both the majority and minority agreed that an approach involving a “formalistic ‘test’ uniformly applicable in all circumstances” must be eschewed. Rather, the Oakes test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs.


214 In Israel, yet another “poster child” for the development of proportionality, the most important analysis and articulation of the principle of proportionality has been given in two recent cases relating to the legality of the security “fence” constructed in the occupied territories: HCJ 2056/04 Beit Sourik Village Council v Government of Israel and HCJ 7957/04 Mara’abe v Prime Minister of Israel. These are the two most important of a number of petitions by Palestinian communities and landowners against orders for the seizure of land in the occupied territories made to enable Israel to build the fence. On the submission advocating Oakes reform in Canada with attention to proportionality jurisprudence of Israel, see Sara Weinrib, “The Emergence of the Third Step of the Oakes Test in Alberta v. Hutterian Brethren of Wilson Colony” (2010) 68:2 U T Fac L Rev 77; Sara Weinrib, “An exemption for sincere believers: the challenge of Alberta v. Hutterian Brethren of Wilson Colony” (2011) 56:2 McGill L J 719 at 734; Mark Zion, “Effecting Balance: Oakes Analysis Restaged” (forthcoming in the Ottawa Law Review, on file with author).
Notwithstanding my previous point regarding the danger of *overemphasizing* proportionality differences across jurisdictions, it is at least equally dangerous to *underemphasize* the differences. British commentator Tom Hickman posits that the doctrine of proportionality refers to a process of analysis which, unlike the meaning of substantive rights, is not greatly influenced by local moral or political beliefs. “There is only need for particular caution,” as he puts it, “where a particular proportionality analysis is closely tied to features of the right under consideration”. 215

Such universalism deserves a skeptical response, especially because of its seeming attraction for so many scholars. Proportionality is a standard of review which is deeply rooted in Constitutions and Constitutions, as Ran Hirschl so rightly submits, “neither originate nor operate in a vacuum”. 216 Similarly, as Beverley McLachlin explains, the *Charter* (and by implication proportionality) “offers a principled

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framework” for addressing Canadian challenges “in a singularly Canadian way (emphasis added)”.

The general argument toward which I’m steering is that proportionality is a skeleton construction that allows for a rigorous, universal requirement on state action infringing rights, while at the same time creating an adaptable test which can be calibrated to different circumstances. Proportionality bridges the domain of law and the domain of interest-based conflict; and again, I believe that the solution, when faced with the possibility of differences, is to strike a proportional balance between the need to contextualize and the need to unify — between the form and substance — with the four-prong proportionality frame being the best available option for doing so.

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218 It is worth noting that at its core, the proportionality framework is about resolving conflicts of constitutional interests, while at one end of the spectrum are private interests (which enjoy the protection of constitutional rights with an empirical trigger)# and at the other end are public interests (which enjoy the constitutional protection by virtue of a limitation clause set out in the constitution); the respectful resolution takes place at the balancing stage of the particularized test.
CHAPTER 2: PROPORTIONALITY DEBATED

2.1. Contested Nature of Proportionality: Frame of Reference

While proportionality debates do not have a rich heritage — it is only recently indeed that some opposition to the principle has begun to form\textsuperscript{219} — the literature on the subject is now abundant. The arguments advanced by critics run the gamut from pinpoint strikes targeted at particular deficits — such as lack of rationality,\textsuperscript{220} incommensurability,\textsuperscript{221} and structural redundancy,\textsuperscript{222} to name but a few — to a complete negation of its soundness.\textsuperscript{223} Evidently, to claim that proportionality critique is \textit{en vogue}\textsuperscript{224} is no exaggeration.

As such, a growing number of commentators turn proportionality into a central feature of their work, claiming that current scholarly discourse is inarticulate or reticent about, for example, deontological constraints in proportional reasoning,\textsuperscript{225} practical reasoning arguments in protecting rights\textsuperscript{226} or, conversely,

\begin{footnotesize}
\textsuperscript{224} Ulf Linderfalk, “Proportionality: On the Significance of the Usage of Conceptual Terms for the Formation of International Law and the Development of International Special Regimes” (2011) 56 CJICL.
\end{footnotesize}
disadvantages of conventional wisdom in proportionality considerations.\textsuperscript{227} Indeed, whether as a framing device or as a target for critique on its own, proportionality is the Klondike for scholars seeking to bring novelty into their works and broaden the focus of their research — not only geographically, but also in respect of the range of conceptual frameworks and discourses they may consider. It comes as no surprise, consequently, that with the proliferation of academic literature, and with proportionality’s rapid worldwide diffusion, there seem to have developed two major camps — \textit{proportionalityphiles}\textsuperscript{228} and \textit{proportionalityphobes} — in whose scholarly works proportionality is being celebrated, \textsuperscript{229} denigrated, \textsuperscript{230} and everything in between.

To confine myself to modern examples, \textit{The International Journal of Constitutional Law} has recently staged an exciting debate on the merits and detriments of proportionality, with Stavros Tsakyrakis attempting to unmask

\textsuperscript{227} Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 534-537.
proportionality as “an assault on human rights”, and Madhav Khosla maintaining that Tsakyrakis has failed to demonstrate any defect in the proportionality test.

Some commentators have read this revival as signaling a positive paradigm shift within the discourse, with constitutional scholarship embracing a more nuanced understanding of proportionality virtues — or, as so often is the case, lack thereof. With that said however, we should not be too quick to form conclusions. While there may be some merit to the argument that the quantity of critical submissions contributes to the quality of the debate, it is worth noting that the plethora of contributions further complicates the task of seeing the whole picture. An even greater challenge for scholars is to navigate themselves through the existing stock of concepts and ideas — especially those which are deeply contradictory per se — without diluting their understandings of the properties, uses, and limitations of proportionality.

I shall not enter the full debate here; suffice it to say that even a brisk survey reveals that, notwithstanding a large body of scholarly literature which has probed the subject, a typical repertoire of proportionality criticism relates to the restricted number of signature publications in the field, while missing much of what can be found on the margins. As a curious reader myself, I have likewise always wondered why only a very small number of publications refer to important earlier articles in

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234 Ibid.
the field (70s and 80s,) let alone, for instance, classical Greek literature or that of the Enlightenment.

Indeed, the current state of the proportionality debate is rather confusing and puzzling, a real problem as proportionality language and concepts expand their domain across jurisdictions. It is important, I believe, that the debate be critically assessed, and expanded, where necessary, to take better account of notions of democracy, rule of law, modern discourses of legal convergence and legal transplantation, certain deontological considerations, and so on.

236 Regarding the concerns about reinventing old theories in proportionality discourse, especially those already articulated in American literature, see, Stavros Tsakyrakis, Proportionality: An Assault on Human Rights? (2010) 7 Int J Constitutional Law 468 at 469.
238 For instance, Greek doctrines of corrective justice (justitia vindicata) and distributive justice (justitia distributiva) have also contributed to the formation of proportionality as a rational concept, not to mention extensive considerations offered by Plato, Aristotle, and ancient philosophers. For the relevant overview of the literature, see generally E Weinrib, “Corrective Justice” (1992) 77 Iowa L Rev 403; I Englard, Corrective and Distributive Justice: From Aristotle to Modern Times (Oxford University Press, 2009); Thomas Poole, “Proportionality in Perspective” (2010) New Zealand L Rev 369.
239 It should be noted that the development of the concept of proportionality is inextricably linked to the Enlightenment of the eighteenth century and the notion of the social contract.
With that in mind, the purpose of this chapter is to present a coherent vision of the current state of the proportionality debate, particularly in response to some common misconceptions. The chapter also seeks to provide proportionality discourse with a clear and comprehensive taxonomy. It will question assumptions about proportionality’s limitations, and also clarify and concretize an agenda for further theorizing by elucidating the arguments pro et contra proportionality.

Admittedly, mine is not the first attempt to taxonomize pro et contra arguments about proportionality. A characteristic example, in this respect, is a classification suggested by Aharon Barak, who, drawing heavily on the signature essay of Alexander Aleinikoff, posits that “the criticism can be divided into two main categories”. Per Barak’s account, the first is internal critique, examining proportionality from within.

The second is external criticism, examining proportionality from a larger legal context. The former mostly focuses on the limitations of the balancing act — proportionality stricto sensu — arguing that it is nothing but a manifestation of intuition and improvisation. However, the latter takes a closer look at the allegedly too wide — and therefore potentially damaging — judicial discretion which proportionality allegedly licences judges to exercise.


Another interesting account may be found in the works of Kai Möller who posits that there are two distinct ways in which to criticize proportionality. In his submission, the first argues that the special normative force held by rights lends them an absolute or near-absolute priority over competing considerations, which effectively renders any talk of balancing, at the very least, misleading. The second line of criticism leaves open the question regarding the normative force of rights, but argues that the principle “has other deficits which make it unsuitable for the resolution of rights issues”.249

The approach I suggest below attempts to transcend these limitations and dichotomies in the debate about proportionality by adopting a wider conception of the concept, one that goes beyond horizontal classification of different components and instead seeks to put them in hierarchical order. At the core of my analysis will lie the idea of network representation of knowledge250 — with a particular emphasis on subsumption-based taxonomy. These will be the bases of my conceptual account of proportionality.

The seeds for this idea were sown when, twisting my way through the range of anti-proportionality arguments, I came to realize that they left me more and more confused. These are complex issues which require sustained investigation and analysis, and as such I was constantly shifting the arguments around like a Rubik's Cube, trying to get all the points aligned. Which left me with the questions –

Can proportionality be reconstructed in the language of visible schemas? Can it fit into a coherent normative framework of decision-making? I believe both questions can be answered in the affirmative.

As one might expect, proportionality — which is in and of itself a judicial formula — does prove far more likely to fit into an analytic scheme designed as a graphic and vivid pyramid, rather than a flowing unorganized narrative — which most accounts of proportionality, unfortunately, are. As such, a structured account of proportionality should consist of asking questions and challenging conventional assumptions. However, that is not what makes it structured; it is what lies behind the questions — a set of categories and a scheme of classification.

A robust interpretation of the aforementioned scheme can be summarized as follows:\textsuperscript{251} It deconstructs proportionality into its underlying premises in a “top-down” fashion, with the process of reasoning moving from one general statement — that proportionality is a means of limitation of constitutional rights — to more discrete particularities, all of which will be addressed in turn. This deductive reasoning not only gives rise to some general questions about proportionality as we travel through premises arranged in an ascending order, but it also takes account of all existing submissions and arguments in debates about proportionality, and thus provides a clear and comprehensive subsumption-based taxonomy. To exemplify what I mean, the critical claim that proportionality fails to provide sufficient protection to constitutional rights is fundamentally different than the critique that some components of the proportionality test are redundant. The latter argument, at

\textsuperscript{251} This is my interpretation; but it is quite plausible to assume that it may involve ideas expressed elsewhere.
the very least, implies that rights are not absolute and that they can be subject to limitation, whereas the former does not necessarily accept this. Failure to recognize this distinction is a common source of misunderstanding when it comes to proportionality critiques.

The scheme of classification I propose arranges the three main dimensions of proportionality — as a tool for rights limitation, a balancing exercise, and a judicial formula — in ascending order, having regard to the specific functions each typically performs. I place proportionality as a tool for rights limitation at the bottom of the scale. Each of the higher levels is higher because it possesses the characteristics of the level below and, in addition, has certain distinctive characteristics which the level below does not have:

1. The doctrinal properties of *rights’ limitation tool* subsume the doctrinal properties of *balancing*.

2. The doctrinal properties of *balancing* subsume the doctrinal properties of the *standard-like proportionality test*.

The remainder of this chapter will examine proportionality from a variety of perspectives, but most importantly, it will examine all of its different facets — and, respectively, limitations attributed to them — at different levels of generalization.²⁵²

My line of reasoning should, consequently, look as follows: proportionality is subject to critique as

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²⁵² Compare with: “Levels of abstraction are teleological, or goal oriented. Thus, when observing a building, which level of abstraction one should adopt—architectural, emotional, financial, historical, legal, and so forth—depends on the goal of the analysis. There is not a ‘right level of abstraction independently of the purpose for which it is adopted, in the same sense in which there is no right tool independently of the job that needs to be done” (L Floridi, *The philosophy of information* (Oxford: Oxford University, 2011a) at 75).
(keyword: *limitation* of constitutional right); (ii) a doctrinal tool to *limit* constitutional rights through the assessment of their relative marginal weight (keyword: *balancing*); (iii) a doctrinal tool to *balance* individual constitutional rights and public interests via a rigid procedural test which consists of 4 threshold components, which are dependent upon fulfillment of one component after the other (keyword: *4-component formalized test.*)

\[4\text{-prong vertical test}\]

\[\uparrow\]

*balancing*

\[\uparrow\]

*limitation*

Each of the three dimensions is provided with an opposite — that is, proposed alternative to proportionality\(^{253}\) — and a correlated set of underlying “big” questions which are supposed to lead us to the heart of proportionality technique. As Robert Alexy effectively puts it: “Asking for the nature of something is more than asking for interesting and important properties\(^{254}\)”.\(^{255}\) According to his view, questions regarding the nature of legal phenomena are questions about their necessary properties. Thus, key questions, pursued through this avenue, include: Is there anything absolute in law? Is it possible to avoid balancing in rights adjudication —

\(^{253}\) I discuss the proposed alternatives to proportionality — both categorization- and non-categorization-based — later in this Chapter. On the idea of alternatives in law, see, generally, Jaap Hage, “Comparing Alternatives in the law” (2004) 12:3 Artificial Intelligence and Law 181.

\(^{254}\) Emphasis added — I.P.

either explicit or implicit? Is it possible to create a purely mechanical legal formula? Are there right answers to legal questions? Is law capable of apprehending and regulating all constitutional conflicts? Is it possible to avoid value-laden judgments in rights adjudication? Can we ascribe a truth-value to the content of legal norms? Do neutrality and impartiality in law exist, in any sense of those concepts? Last but not least, is there merit in the assertion that the proportionality test is symptomatic of a less mature constitutional law system, and is limited to playing a transitional role towards a more mature constitutional law?256

In addition to gaining an understanding of these questions, the ultimate aim of this Chapter is to shed more light on the tension between the “triumphant success of proportionality” and the severity of its criticism. Despite the latter, however, there is much evidence to support the theory that proportionality, being a structured approach to balancing fundamental rights with public interests, does so “in the best possible way”.257 As such, it entails structural, rational, and logical rules that limit the uncertainty of the outcome of a case258 and heighten standards for rights protection.

One may think that proportionality, so interpreted and deconstructed, is a conditio sine qua non in rights adjudication and that it would consistently focus us on the right answers — which is the case. Proportionality creates a discursive frame for norm-based argumentation: a unique, unparalleled and — in a fashion — ultimate principle. But when something goes wrong, and a mistake occurs, it is only

proportionality which is to blame, and whose bankruptcy is signified, and which is reported to be “unsuitable for the resolution of rights issues,” according to critiques — and, in a manner, they are right. For, as the saying goes: “If you think you can do a thing or you think you can’t do a thing, you are right”.

2.2. Proportionality as a Rights Limitation Tool

Nothing seems to me less outdated than the classical emancipatory ideal. Jacques Derrida, *Force of Law*

There is a considerable appeal to the thesis that, once granted, rights should not be taken away. This thesis reflects centuries-long struggles for human rights and fundamental freedoms; it manifests itself in a rich scholarly discourse. For Rawls: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override”. For Nozick: “Individuals have rights, and there are things no person or group may do to them (without violating their rights)”. Such accounts plausibly reflect most people’s self-conception and reflect their intuitive perceptions of rights.

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260 This quote is typically attributed to Henry Ford.
262 It is of note, however, that the very idea of the authority that “grants the rights” — be it a man or God — is not without controversy. Many legal theories posit that human rights belong to individuals since birth. According to natural rights theory, natural rights, or any rights for that matter, are inherent due to our very humanity; it ensues that, for instance, right to life and liberty can never be bestowed by men. Such conceptual difference is not, however, a primary focus of the present paper.
“Protection of rights” is not, however, an easy pursuit for a state to adhere to. It is made even more challenging when the words “protection of public interests” are considered to be of roughly equal importance. As more often than not these two arenas produce “moments of challenge”, the state consistently finds itself in need of negotiating compromises between issues that appear absolute. Opportunely, to achieve what the Supreme Court of Canada Chief Justice McLachlin — so very rightly — calls “a positive partnership between individual and public interests,” numerous resources and strategies are available.

It is these legal strategies — some relatively straightforward, others borderline and difficult — which are the focus of this research. It is a central premise of my argument that, despite a powerful opposition to the idea, we must accept that permitting limitations on rights is inevitable in constitutional adjudication — whichever form it may take. As Peter Hogg describes it, “In any event, there is merit in the frank avowal that the guaranteed rights are not absolutes, and in the establishment of procedural and substantive rules defining the requirements of justification”.

In amplifying this point, I will inevitably grapple with other underlying questions: Is there something in law that can be deemed absolute? Can a right be defeated by a powerful utilitarian justification? What is the basis — both formal and substantive — of rights limitation? If human dignity is inviolable, and rights are grounded in human dignity, must they not provide for very strong, perhaps even

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266 Peter Hogg, Constitutional Law of Canada, Student Ed (Carswell, 2012) at 38-3.

267 Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012 at 131.)
absolute, constraints on what governments may impose? If the most plausible justification for the encroachment on rights is pursuing the public good, what is this good? In a similar vein, what are public interests? As Stephen Gottlieb rightly points out, “while the pedigree of asserted rights has been carefully screened in accord with reigning theories of interpretation, interests have floated into opinions with little analytical rigor”.

The objective of examining the foundations of limitation of rights — as well as overriding public interests — is to provide a retort to the critique of proportionality as “undermin[ing] the very idea of rights” or even “the very idea of constitution”. Another purpose of this study is to underscore two truths. First, we should be skeptical of any extreme account of law, the jurisprudence of absolute rights being the most emblematic example, as legal reasoning is not a mechanical process. Second, it is a fallacy to claim that proportionality is responsible for rights violation — quite the contrary. Through judicial review the individual's right is protected vis-à-vis the majority's power whilst proportionality constitutes the most developed doctrinal underpinning for such a review. These arguments rest

273 It is important to note that in Canada, the proportionality test developed in R v Oakes is recognized to perform a few functions, of which the primary interests for this research constitute safeguarding the
on the assumption that, whichever form it may take, the *de facto* limitation of human rights is inevitable. As such, it is not unreasonable to make it open and properly justified.

The methodological and theoretical toolkit for the present section will constitute traditional accounts of law, but also legal recognition of the fuzziness of legal concepts. As Alec Stone Sweet & Jud Mathews so rightly mention:

> [R]ights provisions are relatively open-ended norms, that is, they are both indeterminate and in danger of being construed in an inflexible and partisan manner. As discussed, judges have good reasons to formalize a balancing procedure, and to impose this on litigating parties. PA represents such a formalization.

The solid strand of the discussion should be informed by the idea of dialectic in law: Heraclitus puts forth the proposition that something can be right and wrong concurrently; Plato was the first philosopher to indicate the grey area between right and wrong. Later philosophers, especially Hegel, endorsed and developed Plato’s thoughts; and most recently, Mattias Kumm & Alec D Walen argued that the framework for reconciling these kinds of tensions – that is, balancing – ought to be understood as thoroughly deontological and morally-grounded. For Kant, morals,
analytics and dialectics taken together constitute metaphysics, which is philosophy, and the highest achievement of human reason.\(^{277}\) I believe that such a holistic approach is necessary, in opposition to many accounts of proportionality, to avoid overly-technical and fragmented approaches that can only lead to the atrophy of value-laden grounds of constitutional adjudication. \(^{278}\) Offering a defense of metaphysics against the fragmentation of science, Heidegger states at the end of his famous lecture that:

"Only if science exists on the base of metaphysics can it advance further in its essential task, which is not to amass and classify bits of knowledge but to disclose in ever-renewed fashion the entire region of truth in nature and history."\(^{279}\)

To begin with, many commentators, reflecting different opinions, have criticized proportionality for not providing enough protection to human rights. It is claimed, for example, that an understanding of rights which makes their existence dependent on applying a proportionality test undermines the very idea of rights. Otherwise stated, if a right can be limited, what is its value?\(^{280}\) In the liberal tradition, rights are widely imagined as “trumps,” which prevail over policy relating to public interest.\(^{281}\) They are claimed to have priority over “the public good” in some strong


\(^{278}\) As Klatt & Meister rightly endorse, “[o]nly a very naïve approach would arrive at the conclusion that any legal reasoning could be value free and deprived of any moral considerations” (Matthias Klatt & Moritz Meister, “Proportionality—a benefit to human rights? Remarks on the I·CON controversy” (2012) 10:3 Int J Constitutional Law 687 at 692). See also, Virgílio Afonso da Silva, “Comparing the Incommensurable” (2011) 31 Ox J Legal Stud 273 at 288. As an example for an overly simplistic view on the matter, he refers to David Beatty’s treatise.

\(^{279}\) Martin Heidegger, “What Is Metaphysics?” (1929) The basic text of Heidegger’s inaugural lecture at the U. of Freiburg in 1929

\(^{280}\) Peter Hogg, Constitutional Law of Canada, Student Ed (Carswell, 2012) at 38-4.

Habermas considers rights as “firewalls,” which provide strong protection against demands made by the political community. Indeed, they are thought to be grounded in human dignity, which in turn is held to be inviolable.

Proportionality, with its insistence that rights can be limited, is therefore potentially at odds with the radical individualism of some forms of liberalism. In his interpretation of Dworkin, for instance, Webber makes it seem as if Dworkin is endorsing the notion that “rights are absolute.” Such an account, without reservations, would close the door for any proportionality considerations. My argument, in this connection, is that most of such “readings” are too simplistic per se. Upon closer examination, it becomes clear that in practice very few rights theories uphold the absolute character of constitutional rights. In a similar vein, modern liberal theories may posit that individual rights are principally superior to public interests, but they do not speak of an uncompromising superiority of rights. A


284 See Art. 1 of the Universal Declaration of Human Rights: “All men are born free and equal in dignity and rights”; Art. 1 of the German Basic Law declares: “Human Dignity is inviolable. To respect and protect it is the duty of all public authority”; Art. 1 of the European Charter of Fundamental Rights states: “Human dignity is inviolable. It must be respected and protected.” Art. 1 of the Constitution of South Africa: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.”
285 Kant, for instance, insists that while everything that has a value has a price, that which has dignity is above all price and thus, presumably, above competing values. For a respectful debate, see Mattias Kumm & Alec D Walen, “Human Dignity and Proportionality: Deontic Pluralism in Balancing” (January 2, 2013). Proportionality and the Rule of Law: Rights, Justification, Reasoning, Huscroft, Miller and Webber, eds., Forthcoming; NYU School of Law, Public Law Research Paper No. 13-03. Online at <http://ssrn.com/abstract=219566>
287 It is important to note that almost all constitutional theories recognize a number of fundamental rights as absolute — or unqualified, as termed by Aileen Kavanagh (Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press, 2009) at 257). A paradigmatic example of an absolute right that cannot be diminished by a competing public interest, or even other
telling example, in this respect, is Mattias Kumm’s statement that although “liberal political rights are widely perceived as having special weight when competing with policy goals,” “nothing in the account of rights as principles prioritizes right”. Having offered a respectful overview of Rawls, Dworkin, and Habermas, he then appears to go a step further by positing that “[r]ights and policies compete on the same plane within the context of proportionality analysis”.

Interestingly enough, Aharon Barak argues that the “side constraints” theory of rights may peacefully coexist with the methodology of balancing: “Indeed, the component of proportionality stricto sensu may well incorporate the notions of “rights as trumps,” or “rights as firewalls”. As stated by Matthias Klatt and Moritz

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right, is a widely accepted prohibition of slavery (see, e.g., Art. 4 of the Universal Declaration of Human Rights.) Another example of an absolute right is a prohibition of torture (Art.3 of the European Convention on Human Rights stipulates as follows: “No one shall be subjected to torture or to inhumane or degrading treatment or punishment.”) Interestingly enough, the German Basic Law (Grundgesetz) provides an uncompromising superiority to human dignity. Article 1(1) of the German Constitution reads thus: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” In the decisions of the Federal Constitutional Court of Germany, human dignity operates as an absolute barrier to governmental encroachment upon individual rights; more importantly, though, human dignity is considered to be of higher importance than human life (Consider BVerfGE, February 15, 2006, BVerfGE 115.) The foregoing theory of unqualified rights, however, is not without problems of its own. For the growing security concerns across the globe pose questions that still await their answers: Do terrorists have an absolute constitutional right not to be tortured? What if the investigation that has recourse to force may lead to many lives being saved? These challenges add an additional layer of complexity to the doctrine of unqualified rights.

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289 Ibid at 142.
291 Barak at 490. It is important to note, that such an acknowledgement is not without criticism. Tsakyrakis, for instance, posits that “by definition, any treaty for the protection of human rights gives priority to rights.” However, he does not present any particulars as to how rights can trump other considerations. He simply argues that a concept of rights as trumps was incompatible with balancing: “in . . . balancing, there cannot be any concept of fundamental rights having priority over other considerations.” This view is similar to Beatty’s argument that, in proportionality, rights “have no special force as trumps,” but are “just rhetorical flourish.” Likewise, da Silva argues that trumping is defined by the complete absence of balancing. As Klatt & Meister rightly observe, these authors understand the concept of a “trump card” as a categorical concept, rather than a classifying concept: It defeats other cards irrespective of their weight (Matthias Klatt & Moritz Meister, “Proportionality—a benefit to human rights? Remarks on the I·CON controversy” (2012) 10:3 Int J Constitutional Law 687.)
Meister in their recent article, proportionality and trumping are compatible by means of two conditions:

first, by requiring that the legitimate aim is of constitutional status; and, second, by assigning higher abstract weights to rights than to other considerations. Tsakyrakis’ and da Silva’s assumption that balancing and trumping were incompatible is thus incorrect.292

Another problem with declaring rights as absolute — or the notion that one right must always prevail over other constitutional values, including other rights provisions, therefore creating a hierarchy of rights — is articulated in an interesting account by Alec Stone Sweet & Jud Mathews. As they submit, in so doing, the court would “in effect, constitutionalize winners and losers. Further, we know of no defensible procedure for doing so other than freezing in place a prior act of balancing: insofar as judges gave reasons for having conferred a higher status on one value relative to another, they have in fact balanced”.293

Having grappled with the contested underpinnings of the jurisprudence of absolute rights, it is now that I proceed to the next limb of inquiry: If the rights are deemed relative, then we limit them in favor of what? The most plausible — although highly contested — explanation stems from the protected interests theory (later was mostly propounded by the Jurisprudence of interests school.)

As noted by Horacio Spector, in its early formulation as the “benefit theory,” the protected interest theory was first suggested by prominent English philosopher

and jurist Jeremy Bentham. In his view, A’s having a right to X against B means that A is the beneficiary of B’s duty to do X. The German legal scholar Rudolf von Jhering proposes a clearly recognizable form of the interest theory when he changed his jurisprudential position from legal formalism to legal instrumentalism. Von Jhering famously defines a legal right as a “legally protected interest”. In its most plausible version, propounded by Joseph Raz, the interest theory holds that A’s having a right to X against B means that an interest of A’s, or an aspect of his well being, is a sufficient reason for holding B under a duty.

In terms of intellectual history, the Jurisprudence of interests developed in the late nineteenth century against a backdrop of the formalistic Jurisprudence of concepts failing to accommodate various normative concerns and policy considerations. It was the scholars’ understanding of law as dealing with a number of conflicting private and social interests that forcefully suggested a depiction of the judge’s task as involving a balancing of these interests. As Jacco Bomhoff observes, the interests-based alternative was developed by François Gény and other juristes inquièts in France,

Philipp Heck and his fellow members of the school of Interessenjurisprudenz (Jurisprudence of interests) in Germany, and Roscoe Pound and other

296 The protected interest theory has also been defended by Neil MacCormick (1982), and D. N. MacCormick (1977).
300 For an account in English, see Albert A. Ehrenzweig, “Book Reviews” (1948) 36 Cal L Rev 502.
“sociological jurisprudes” in the United States. The foregoing insight – law as a mechanism for dealing with “social weighing” and “colliding interests” – has to be situated as an extension of Jhering’s emphasis on teleology in legal method and his account of “rights as protected interests.” Interestingly enough, in his 1936 article, Philipp Heck suggested that he had always seen individual interests as worthy of protection only because of the fact that they were simultaneously social interests.

In the U.S., at the beginning of the twentieth century, there were likewise conscious efforts to replace Lochner’s formalism with the balancing of interests doctrine. The latter was well suited for dealing with problems that lie at the intersection of legal method and politics and was propagated by the socially progressive sociological jurisprudence.

Roscoe Pound, the main early advocate of the balancing of interests in America, marshaled a conception of “judicial decision-making as part of [a] larger project of social engineering.” This historical evaluation allows seeing the modern American jurisprudence on balancing in a slightly different light and may account

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301 On sociological jurisprudence, see Edward White, “From Sociological Jurisprudence to Legal Realism: Jurisprudence and Social Change in Early Twentieth Century America” (1972) 58 V L Rev 999. For a more recent account, see Moshe Cohen-Eliya & Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” (2010) 8 Int’l J Const L 263. As the authors write in their paper, a key phase in the development of balancing in the U.S. was the work of the “Sociological Jurisprudence” in the early decades of the twentieth century, in particular of Dean Roscoe Pound of the Harvard Law School.


304 Some claim that American sociological jurisprudence is nothing short of reappraising of German jurisprudence of interests.

for the frequent invocation of “balancing language” in the Supreme Court’s reasoning. Consider the following passage:

Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.\(^{306}\)

To conclude, the explanation of theoretical underpinning of proportionality — as a rights’ limitation factor, with a justification framework behind it — should necessary blend legal, political, philosophical factors and logic, theorized in a particular way. In a nutshell, beneath the surface of everything alluded to above, lies the catalog of what, in figurative words of the Ontario Human Rights Commission, “not to do” in a competing rights scenario: (1) treating any right as absolute; (2) regarding any right as inherently superior to another; (3) accepting a hierarchy of rights; and (4) approaching rights in an abstract or in a factual vacuum.\(^{307}\)

In rights adjudication, there is no room for the rule of the excluded middle (either A or not-A.) As such, A and not-A together may productively coexist as the very nature of multi-faceted democracy presupposes what T Roux calls the “constructive tension”\(^{308}\) between competing interests and values.


2.3. A Fine Balance: Proportionality as a Weighing Exercise

*He [Hegel] did not know to what extent he was right.*

*George Bataille*309

As covered in more detail in the next section, human rights adjudication might or might not manifest itself through proportionality. However, in reconciling individual rights with public interests, there is positively no way around *balancing*, an adjudicative technique which can coexist with other regulative ideas310 or operate on its own. Whether articulated or in disguise, balancing permeates all levels of analysis and of generality in value-laden judgments. This section investigates that elusive *je ne sais quoi* of balancing: the cluster of special qualities which makes balancing “an inseparable part of legal interpretation and reasoning”311 which is “inherently embedded in constitutional language”.312

While almost omnipresent,313 balancing is, nevertheless, highly contested. As the former President of the Supreme Court of Israel Aharon Barak observes, proportionality criticism tends to be “aimed at the component of proportionality *stricto sensu*,”314 by which he means balancing between conflicting principles. Calling it “doctrinally destructive nihilism,” for example, a member of the US Supreme Court has asserted that balancing is but a “convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its

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310 Balancing is at the core of the last stage of proportionality analysis – proportionality *stricto sensu*.
313 German scholar Robert Alexy maintains that balancing “is ubiquitous in law” (See, Robert Alexy, “On Balancing and Subsumption”)
differences". Others have similarly criticized proportionality as nothing short of the Trojan horse camouflaging judicial policy-making.

In the remainder of the section, my aim is to challenge these, and similar, criticisms and, along with amplifying my point about the inescapable character of balancing in rights adjudications, to chart the arguments on balancing’s shortcomings so as to create a coherent, clear, and, hopefully, exhaustive road map. I do not attempt to restrict my discussion regarding balancing to a specific legal theory. Rather, my argument is premised on consistent applications of a variety of legal theories and modern proportionality discourse.

To begin with, what is balancing? As Kai Möller rightly observes, “[i]t is not obvious what the reference to “balancing” means, and this vagueness is indeed part of the challenge posed by critics of proportionality”. Not far from the truth is a submission by Stephen Gottlieb who claims that balancing “is a term for a process in an opaque box that is undefined and undefinable”. Even if individuals can balance for themselves, as Alexander Aleinikoff describes it, the process is so indeterminate that “we have no good way to share a definition, or to reach determinate results”. Underlying these considerations is a growing concern that, if we cannot define balancing, “we cannot show people how to do it, and thus, we cannot use it”. This is a powerful thesis. However, there is still a crucial distinction between balancing

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and mere intuition and gut-feeling, and understanding that distinction is the basis for defending the concept.

According to Massimo Durante,\(^{321}\) when thinking of balancing, we typically confront ourselves with four distinct questions, which together constitute the core of a structural analysis of balancing:

(1) what are we to balance between?
(2) what does it mean “to balance”?
(3) what types of balancing do we have recourse to? and finally,
(4) what are the characters of a balancing activity?

The word “balancing” brings to mind an image of scales, as we are all familiar with mechanical weighing. What is heavier: this apple or that orange? This rock or that brick? However, mechanical weighing is not the only domain of balancing; our private life considerations are also susceptible to balancing, as is thinking more generally. As many commentators posit, balancing reflects life experience and careful reasoning.\(^{322}\) It is also an expression of rational thinking.\(^{323}\) As Stavros Tsakirakis submits, the balancing metaphor includes “a great variety of reasons and human actions”:

Should I go to the movies tonight or not? In order to make up my mind and act accordingly, I will probably have to do some kind of reasoning. One way to describe this reasoning is to say that I balance the pros and the cons of going to

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\(^{323}\) See Joseph Raz, Practical Reasons and Norms, 2nd edn, (Oxford University Press, 1999) at 95.
the movies, and if the former outweigh the latter I will go, if not I will stay home.324

In a nutshell, the balancing process distilled to its essence – in law, as in life – may be summarized thus: “When faced with choice, pick the better”.325 Before I get started with the legal analysis, though, a caveat is in order. Those subscribing to constitutional theories which endorse balancing often make it seem as if balancing relates to some kind of decision engineering which produces demonstrably correct answers by a weighing processes. Yet, as Aharon Barak rightly admonishes, “[t]he discussion regarding balancing, followed by the discussion regarding the weight, is a metaphor”.326 The scales do not actually exist.327 The consideration regarding balancing is normative in nature:328

The solution is not to provide a permanent label of “weight” to each conflicting principle, but rather through shaping legal rules – the rules of balancing – that determine under which circumstances we may fulfill one principle while limiting another.329

328 On value-laden judgements in balancing – and proportionality, for that matter reasoning see later in this chapter.
As observed in the previous chapter, once a court has reached the balancing stage in proportionality analysis, it has necessarily established that there is an inherent conflict between the right and public interest, which cannot be resolved in any less restrictive way. At the balancing stage, therefore, the question arises as to whether the interference with the right is justified in light of the gain in the protection for the competing right or interest. To this end, the two values must be “balanced” against each other.

Massimo Durante, drawing on Giorgio Pino, defines balancing as an argumentative technique, employed to decide a case which could be subsumed under two or more norms.\textsuperscript{330} The process springs from a conflict between contrasting rights (principles, values or interests) which cannot be solved as a normal conflict between norms, since the rights are all potentially applicable.\textsuperscript{331} As previously mentioned in this thesis, in a democratic society, there is pluralism or “the proper relationship between the interests of society and human rights”,\textsuperscript{332} which asks the judiciary to strike a balance between those interests (or principles, according to Robert Alexy).\textsuperscript{333}

As Aharon Barak describes it, the basic rule of balancing provides normative content to the balancing at the heart of proportionality \textit{stricto sensu}. It operates at the highest level of abstraction and therefore requires a concrete application on a case-by-case basis. This application is done through specific (or \textit{ad hoc}) balancing.

\textsuperscript{331} Massimo Durante, “Dealing with Legal Conflicts in the Information Society. An Informational Understanding of Balancing Competing Interests” (2013) Philosophy & Technology (accepted papers series) at 6.
Yet balancing is under constant attack. Grégoire Webber points out on many occasions 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 right-claims”.334 More than that, “[w]hen it comes to constitutional adjudication, balancing can never be dissociated from lawmaking: it requires judges to behave as legislators do, or to sit in judgment of a prior act of balancing performed by elected officials”.335

Matthias Klatt & Moritz Meister in The Constitutional Structure of Proportionality,336 distinguish between eight kinds of balancing criticism: that balancing tends to go together with a broad definition of rights, that its indeterminacy undermines the rule of law, that morality is not about balancing, that balancing gives a false impression of calculability, that the idea of balancing is incompatible with a core of inviolable rights, that balancing gives up the standard of correctness in favor of a weaker standard of appropriateness or adequacy, and that balancing tends to swallow up other prongs of the proportionality test.

A particularly strong line of criticism argues that balancing is often, if not always, confronted by values, goods, or interests which are incommensurable.337 To Tsakyrrakis, the argument regarding incommensurability is frequently considered to

constitute “the most effective critique of balancing”.\footnote{Stavros Tsakyarakis, “Proportionality: An Assault on Human Rights?” (2010) 7:3 Int J Constitutional Law 468 at 471.} It proceeds on the assumption that in order to balance between competing principles they should be based on a common denominator.\footnote{Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 482.} As Matthew D. Adler and Eric A. Posner posit in relation to such cases, speaking of balancing “is particularly troublesome since weighing presupposes a common scale which in the case of incommensurable values does not exist”\footnote{Matthew D. Adler & Eric A. Posner, “Rethinking Cost-Benefit Analysis” 109 YALE. L.J. 165 (1999).} Others espouse a view that the metaphor of weighing in and of itself “says nothing about how various interests are to be weighed, and this silence tends to conceal the impossibility of measuring incommensurable values”.\footnote{Stavros Tsakyarakis, “Proportionality: An Assault on Human Rights?” (2010) 7:3 Int J Constitutional Law 468 at 471.} As Virgilio Alfonso Da Silva articulates it:

At the core of the proportionality test is the balancing stage, where the right is balanced against a competing right or public interest. “Balancing” suggests the image of scales, however, and scales serve their purpose only when the two things to be compared can be measured with the same unit (for example, grams). In the domain of constitutional rights, the question thus arises whether it is really possible to “balance,” for example, the right to freedom of the press against a person’s interest in privacy. It seems that unless there is a common scale on which the two conflicting goods, values, or interests can be compared, such balancing is impossible. In that case, one might have to conclude that the two are incommensurable.\footnote{Kai Möller, "Proportionality: Challenging the Critics" (2012) 10:3 International Journal of Constitutional Law 709.}

Matthias Klatt and Moritz Meister suggest considering the argument on incommensurability as coming in two variants: The first points to the fact that “our moral universe includes ideas not amenable to quantification.” The second
challenges the assumption that interests are “ultimately reducible to some shared metric” and that, “once translated into this common standard, they can be measured against each other”.\(^{343}\)

In contrast, some scholars believe that it is always possible to carry out a rational judgment of proportionality, by reasoning with numerical magnitudes,\(^{344}\) non-numerical magnitudes,\(^{345}\) or by “comparing the incommensurable”: “Just as it is possible to compare apples and oranges relative to a given covering value (vitamin content, for instance),” according to Alfonso di Silva, “it is also possible to compare and balance constitutional rights relative to a given covering value: their degrees of satisfaction and non-satisfaction”.\(^{346}\)

Making a strong case in defense of balancing, Stephen Gottlieb argues that many anti-balancing arguments are simply “irrelevant”:

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\text{The open texture or indeterminacy of balancing is illegitimate from positivist and liberal perspectives because balancing appears political. Open texture is assumed by realist and critical scholarship that treats all law as political. In the end, however, the choices actually available have little to do with decision-making procedure or whether balancing is too imprecise. Like the arguments about interpretation, the arguments about balancing are significant primarily as arguments about what gets scrutinized and what gets assumed without examination. The useful question is not psychological or procedural, but political and jurisprudential. The useful question asks: What “improves” the results?}^{347}\]

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Paradoxical as it may seem, another strand of the balancing debate refers to two different — indeed antinomical — claims: the first posits that proportionality opens gates to imposition of the moral preferences of judges upon society in which they operate (what in metaphorical words of Kai Moller may be called the “moral infection”\textsuperscript{348} of balancing); the second submits that the balancing exercise is too formalistic and does not allow societal values to come upon the stage. Without going into much detail here, my point is that both approaches distort two truths: that balancing — and proportionality for that matter — has never pretended to be a morally neutral analysis;\textsuperscript{349} and that no judicial reasoning can be totally extraneous to value-laden judgments. Indeed, it is occasionally argued that proportionality analysis is, or claims to be, morally neutral. Stavros Tsakyrakis writes: “[The principle of proportionality] pretends to be objective, neutral, and totally extraneous to any moral reasoning”.\textsuperscript{350} By the same token, Grégoire Webber states: “The structure of proportionality analysis itself does not purport (at least explicitly) to struggle with the moral correctness, goodness or rightness of a claim but only with its technical weight, cost or benefit. The principle of proportionality—being formal or empty—itself makes no claim to correctness in any morally significant way”.\textsuperscript{351}

All above considerations notwithstanding, an obvious way to criticize any procedural phenomenon — balancing being no exception — is to give an example of a legal technique which overall performs better. The paradigmatic illustration of this

approach in respect to balancing comes from the jurisprudence of the United States. Recently, for example, Frederick Schauer provocatively argued that as European constitutional law matures over time, it will develop the same rule-like structure which characterizes the more “mature” American constitutional system.\(^\text{352}\)

As Alec Stone Sweet and Jud Mathews emphasize, American rights doctrines are a tangle of different tests, some requiring the court to “balance” or “weight” factors, and some taking the form of categorical constitutional rules.\(^\text{353}\) It is categorization which is of primary interest in what follows. Most rights enumerated in the Bill of Rights are expressed in absolute terms and each right constitutes its own category. The similarities between the enumerated rights have enabled the development of three categories, to which most rights may be attributed\(^\text{354}\) and, accordingly, three tiers of review.

Canonically, the tiers are strict scrutiny, intermediate scrutiny, and rational basis review. The picture is complicated somewhat by less well-established gradations (e.g., “rational basis with bite”). Moreover, the US Supreme Court does not always use these three labels. Some commentators point out that tests for a number of constitutional claims, from privileges and immunities issues to public-forum speech regulations, amount to intermediate scrutiny, even when the Court does not apply such a label.\(^\text{355}\)


\(^{355}\) Alec Stone Sweet & Jud Mathews, ”All Things in Proportion? American Rights Doctrine and the Problem of Balancing” (2011) 60 Emory Law Journal 797
As Stephen Gottlieb observes, “[t]here is an extensive literature about whether balancing or categorization is preferable”. 356 There are important distinctions between *ad hoc* balancing for each individual case and balancing to derive rules (categorization).357 There are also important common features. Both involve a “weighing” or “judgment” among conflicting values, and most of pro and con arguments apply to both, albeit in varying degrees. As Stephen Gottlieb succinctly puts it, “[t]he pro and con positions themselves are largely categoric”.358

Aharon Barak opines that, methodologically speaking, thinking in legal categories stands in sharp contrast to legal thinking based upon specific, or *ad hoc* balancing.359 From the outset, the focus on categories was meant, among others, to prevent *ad hoc* balancing. It is important to note that legal categorization indeed accepts the notion of principled balancing but does so only at the interpretive level where determination of the scope of the categories in question takes place.360 Yet, as Alec Stone Sweet and Jud Mathews rightly observe, at the core of each legal category is the interpretive balance which precedes its creation.361

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Below I will venture to affirm, by means of a hypothetical argument, that proportionality — with balancing at its core — and American strict scrutiny are indeed similar answers to similar questions which are, nonetheless, presented under different headings. In so doing, I am going to adopt Kai Moller’s notion that making a step aside from conventional academic approaches to explaining legal concepts can contribute to articulating and clarifying their contours. As he puts it in respect to his own iconoclastic approach:

Even though this account will present some of the features of proportionality in a way which may not be the standard textbook approach, it does so in the hope of clarifying the respective points rather than bringing in controversial claims through the back door.\(^{362}\)

Imagine again a hypothetical case, wherein a pleaded constitutional right comes into conflict with a pressing societal objective. To complicate matters, this is the first case in the particular jurisdiction to deal with such a dilemma, and as such no precedential analytical framework for such a quandary exists.

More specifically, imagine the case involves a claimant whose right to freedom of expression has been breached by a law prohibiting speech advocating the forcible overthrow of government. A judge hearing this case would likely be sympathetic to the supremacy of the constitutional provision granting a right (and, should he be dissatisfied with the current government, possibly with the claimant’s cause as well). However, common sense, and a basic instinct for self-preservation — he is, after all, a part of the governmental machine as well — tells him that he cannot

uphold the claim. But nor can he explicitly breach the Constitution. He is cornered; what does he do?

Of all the possible solutions, two stand out in terms of their distinctive features and prevalence in different jurisdictions. One position, perhaps the most obvious on the face of it, is to, through interpretation of the relevant provision, take the rebellious speech out of the ambit of the right to freedom of expression. If the claimant enjoys no constitutional right, the situation consequently involves no conflict. The constitutional right is not breached, the public peace and order are protected, the judge maintains an appearance of the mechanical applicator of law and does not explicitly trespass on the legislator’s territory. It is win-win for everyone, except, of course, for the claimant.

A contrary approach, is for the judge to acknowledge that the rebellious speech does make up a part of the right to freedom of expression but, due to its tenuous marginal value, it is outweighed by the pressing societal objective — preservation of public peace and order. Otherwise stated, an amount of deleterious effects on the right arguably fall at the low end of the spectrum of free expression. Such an approach forces the judge to engage in extensive consideration of whether the societal objective is really pressing (which it obviously is), whether it is connected to the rebellious speech ban (what else but this?) and whether it may, in the calm of the courtroom, be possible to imagine a solution which impairs the right at stake less than the solution Parliament has adopted, provided alternatives would be equally effective. Similar to the solution outlined above, the judge pretends to mechanically bind the factual and legal matrix up to the last step of his inquiry — that of balancing. Such a framework, accordingly, allows a judge to attend to the
context of the particular case and force a government to make an effective case for their defense, which calls for adducing evidential support and providing strong argument in rebuttal.

On the face of it, the first solution keeps one’s hands clean of engaging in the cost-benefit analysis which will inevitably arise at the balancing stage should you opt for the second option. Upon careful reflection, however, we come to realize that the judge’s interpretation of the scope of the right, as per the first solution, is but a cost-benefit analysis in disguise. In order to find out whether the rebellious speech makes up a part of the protected freedom of speech, the judge has to establish from the outset that the state’s objective of preserving public order and the government’s immunity deserves to be awarded more weight than the deleterious consequences for the “call to rebellion” speech.

The example helps illustrate the difference between the framework of American strict scrutiny\textsuperscript{363} and a classical four-component proportionality analysis .

Stephen Siegel suggests, however, that the difference may not be as great as it first appears. The roots of strict scrutiny analysis, he points out, found in First Amendment cases from the 1950s and early 1960s, suggest the approach was meant to be less rigid than it has become.\textsuperscript{364} Strict scrutiny was originally quite flexible, he argues. “In looking [at its origins],” he says, “we find that strict scrutiny started life not as a blunt hammer for striking down legislation, but a flexible instrument that combined new and old doctrinal elements to balance the benefits and costs of rights

\textsuperscript{363} For a further reflection, compare with Dennis v United States, 341 US 494, where the court also engaged into the explicit balancing.

The dispute over categorization and balancing is therefore miscast, he continues, and for several reasons:

First, the methods are not often determinative. Second, the methods can often be translated into one another. Third, as explored below, the dispute is miscast because the decision between balancing and not balancing is illusory. The only "real" decisions are when intuitive judgments, whether described as balancing or otherwise, should be allowed to enter the analysis, which assumptions should be articulated, and which should be left inchoate.

It is important to note that judges themselves sometimes acknowledge that they are effectively engaging in balancing competing privately-held rights and public interests. In one US Supreme Court decision, for example, it was stated that “[t]he demands of free speech in a democratic society as well as the interests in national security are better served by candid and informed weighing of competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved”.

Similarly, in another case, the following was said: “Where First Amendment rights are asserted to bar governmental interrogation[,] resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances”.

Indeed, it likely makes a difference, and in some cases a considerable difference, which procedural approach to balancing — open acknowledgement or

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367 Dennis v United States, 341 US 494, 524 – 525 (1951)
368 Emphasis added – I.P.
histrionic abdication — a court decides to employ. In their recent article, Alec Stone Sweet and Jud Mathews illustrate this point by looking at cases where courts on both sides of the Atlantic — the Supreme Court of the United States and the German Federal Constitutional Court — elaborate on standards of review in an attempt to establish the role of balancing in human rights adjudication. The authors begin with the well-known 1955 US Supreme Court decision *Williamson v Lee Optical of Oklahoma, In.*,370 which involved an Oklahoma statute that forbade opticians (who grind and duplicate lenses, and fit them to frames and faces) from selling their services and products without prior authorization of either an ophthalmologist (a medical doctor specializing in eye care) or an optometrist (a licensed professional who diagnoses but does not treat eye disease, and who writes prescriptions for lenses).371 By way of summary, “[t]he inevitable result of the enforcement of the provisions,” in the words of one district court judge, “will be to literally put said plaintiffs out of business. . . .”372 Oklahoma claimed that the statute was designed to promote better eye care, not least by increasing the frequency of eye exams.373

Using rational basis review, the Supreme Court found that the Oklahoma State Legislature had a legitimate interest in requiring a prescription from a licensed optometrist or ophthalmologist:

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and

disadvantages of the new requirement. . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v Illinois*, “For protection against abuses by legislatures the people must resort to the polls, not to the courts”.374

However, such a demonstrative abdication of judicial balancing may be a case of “protest[ing] too much.” Upon closer examination it becomes clear that what the court attempts to portray as avoiding balancing is in effect nothing short of balancing in disguise. Put another way, the rational basis review is a convenient cover for the court to determine, through balancing, that the right can never outweigh any reasonable public purpose legitimately pursued by the government.375

Consider, by way of contrast, one of the earliest balancing cases of the German Federal Constitutional Courts, *Apothekenurteil*,376 which was decided at roughly the same time as *Lee Optical*. In this case, a druggist challenged a Bavarian law regulating drugstores on the ground that it violated Article 12(1) of the German Basic Law,377 which provides for occupational freedom. The law authorized the licensing of new pharmacies only when “in the public interest” and only when new

376 *Apothekenurteil* (1958) [BVerfG] Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 377 (Ger.).
377 Article 12(1) stipulates, “All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated
378 by or pursuant to a law.”
stores would not destabilize the market by threatening the viability of existing pharmacies. In framing its analysis, the GFCC squarely confronted the tension between individual rights and public goals, which led it to embrace balancing:

The constitutional right should protect the freedom of the individual; the professional regulation should ensure sufficient protection of societal interests. The individual’s claim to freedom has a stronger effect . . . the more his right to free choice of a profession is put into question; the protection of the public becomes more urgent, the greater the disadvantages are, that come from the free practicing of professions. When one seeks to maximize both . . . equally legitimate . . . demands in the most effective way, then the solution can only lie in a careful balancing of the meaning of the two opposed and perhaps conflicting interests.

In a comprehensive decision, the court then articulated an inchoate version of proportionality reasoning, tailored to the specifics of Article 12(1), 219 and annulled the law on necessity grounds. Unlike its American counterpart, the German constitutional tribunal eschewed rigidity and absolutism, as well as the temptation to advise claimants to “go to the polls, not the courts.” To the contrary, in assuming responsibility for judicial review, it has addressed balancing squarely and openly and therefore, in words of Alec Stone Sweet and Jud Mathews, made it clear:

(a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.\(^{378}\)

To sum up, as Stephen E Gottlieb describes it, nothing speaks against the thesis that rights, interests, and values can be weighed at many different “levels” of analysis and of generality. They may be described differently at each level and efficiently take into account necessary deontological considerations. As Gottlieb powerfully states:

Nevertheless, for all their insight, the global all-or-nothing arguments against balancing that we have been considering will turn out to be irrelevant if everything is balancing, nothing is balancing, or if the useful question about balancing is contextual so that balancing is sometimes good and sometimes not, even in constitutional law.

In fact, everything is balancing. Admittedly, this is not a theory which we, as lawyers, are most comfortable with. We are at liberty either to deny or to welcome it. However, whatever path we choose, it does scant justice to plain and simple truth: balancing is inevitable.

This frank avowal, in my submission, is more benevolent to safeguarding rights than the kind of mischievous partisan rhetoric that claims: “Balancing is inadmissible, but our truth far outweighs yours.”

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380 See Craig R Ducat, Modes of Constitutional Interpretation (1978) at 181-83.
382 A distinctly interesting account of denial of reality as the evolutionary power and the secret of humanity’s success is presented in a recent book by Ajit Varki & Danny Brower, Denial: Self-Deception, False Beliefs, and the Origins of the Human Mind (Twelve, 2013)
2.4. Proportionality as a Conceptualized Balancing Framework

The previous section has established that balancing, despite the controversies it routinely occasions among judges, practitioners, and academics, is an inevitable component of legal reasoning. It is now that I shift the focus to proportionality — a balancing doctrine conceptualized in a particular way.\(^{383}\)

Celebrated and castigated in equal measure, proportionality has nonetheless successfully travelled the globe.\(^{384}\) As Alec Stone Sweet and Jud Mathews put it, “[i]n many polities today, proportionality is treated as a taken-for-granted feature of constitutionalism”. \(^{385}\) Jud Mathews has stated that “judges have raised proportionality to the rank of a fundamental, constitutional principle, which they deploy to manage rights claims, including conflicts between constitutional rights”.\(^{386}\) Yet as Grégoire Webber effectively observes, “[w]ith few exceptions, State constitutions and international conventions do not make any reference to the principle of proportionality or to balancing”.\(^{387}\) Be it the European Convention on Human Rights,\(^{388}\) the Canadian Charter,\(^{389}\) the Israeli Basic Laws,\(^{390}\) or any other


\(^{384}\) As has been previously mentioned, by the end of the 1990s, the vast majority of effective systems of constitutional justice in the world, with the exception of the United States, had adopted proportionality reasoning in constitutional adjudication.


\(^{388}\) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [ECHR] (commonly known as the European Convention on Human Rights). The Strasbourg Convention does not contain a general limitations clause. The rights and freedoms set out in it can be loosely divided up into three categories: those without any express qualifications (such as the prohibition of torture); those which are subject to a number of specific limitations (such as the right to liberty and security of the person); and those which are subject to more broadly framed
constitutional bill of rights, none contains the plausible textual “pegs” for invocation of the “proportionality” principle.

Nor do they specify the direct authority for the subsequent introduction of proportionality into judicial reasoning. Indeed, per Jonas Christoffersen, “[i]n a European context, express references to proportionality were not made at the time of drafting of the ECHR in the late 1940’s and the principle of proportionality was codified by the EC Treaty as late as 1993”.

In a similar vein, the application of the principle of proportionality under the Canadian Charter is based on the SCC’s interpretation since its landmark decision in Oakes in 1986 – despite the fact that no explicit references to proportionality can be found in constitutional provisions. As Joel Bakan puts it, “it is not clear why the four criteria in the Oakes (1986) test constitute a uniquely correct interpretation of Section 1. The words “reasonable limit” and “demonstrably justified in a free and democratic society” do not necessarily, or even obviously, translate into the Court’s four-step test”. Alec Stone Sweet and Jud Mathews point out that “reasonable limits ... as can be demonstrably justified in a free and democratic society” could be interpreted to mean “proportional limits,” but that reading is not compelled by the limitation clauses. The last of these include rights such as freedom of expression and the right to private life and, although formulated in a different way, the right to property. It is the qualifying clauses in this last category that most closely resemble Section 1 of the Charter, both in conception and wording.

389 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. The Charter contains one general limitation clause which applies to all the rights and freedoms secured by it. Section 1 provides as follows: “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.”


393 Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 28.
text. The language of Section 1 seems equally open to a more relaxed “reasonableness” or “rational basis” standard.  

These are just some examples; indeed, there are many others. The argument toward which I am steering is that proportionality – despite consistently being taken for granted – is in need of legal and democratic justification. The proportionality framework is not the only tool designed to provide solutions to conflicts between constitutional rights and public interests. Other legal tools also seek to provide solutions to challenges such as these. Why, then, is it proportionality that supposedly provides the best “systematic, transparent, and trans-substantive doctrinal structure for balancing”? What is the criterion for a proper balance between the two facets of democracy, constitutional rights and collective interests? Stavros Tsakyrakis recently opined that “the term ‘balancing’ has come tantamount to the principle of proportionality”. Are the two frameworks indeed different? If the things are “in balance,” can they still be disproportional, and vice versa?  

In a nutshell, if there is one inquiry running through the remainder of this chapter, it is this: Why, if the court indulges in balancing in reconciling conflicting constitutional interests — given that balancing is inescapable either way—should it do so in a particularly conceptualized fashion? Simply put, why does balancing

perform better if exercised through proportionality versus other doctrinal frameworks, such as, for instance, reasonableness or categorization?\textsuperscript{399}

Before I proceed, however, yet another caveat is in order. As Joel Bakan describes it, “[t]he means/ends proportionality creates an impression of technicality and scientific objectivity”. \textsuperscript{400} That impression, he suggests, is, nevertheless, illusory.\textsuperscript{401} To argue that algorithmic-like formulas are infallible modes of decision-making in constitutional adjudication would be a mistake; indeed, I am not making that argument. Nor am I endorsing a notion of the scientific accuracy of proportionality \textsuperscript{402} — on the contrary. I cannot but agree with the fierce proportionality opponent Gregoir Webber that “[a]rguments about constitutional rights cannot be transformed into management and mathematical measurement”.\textsuperscript{403} Rather, I am arguing that the dichotomy should be re-framed in terms of “structured argumentation framework” (proportionality) versus “intuitive and improvised reasoning”, given that balancing can lie at the core of both. This conclusion is reinforced by the debate over the virtues of structured and particularized reasoning discussed below.

For taxonomic purposes, the term “legal formula” (or “formulaic reasoning,” “algorithmic procedure,” and “argumentation framework” which will be used interchangeably) is “rational” and “computerizable” [maybe use ‘mechanical’ or ‘schematic’ or ‘rigorous’] insofar as it denotes intelligible step-by-step frameworks

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\textsuperscript{399} On the discussion on proportionality’s alternatives, see Sections 2.3 and 2.4.
\textsuperscript{400} Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 28.
\textsuperscript{401} Ibid.
\textsuperscript{402} Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 482, 486.
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for generating answers to legal questions. However, these frameworks are not, as mentioned above, purely objective and scientific. According to Sartor, such frameworks embody series of inference steps, represented by statements justified by reasons (or inference rules) which lead to conclusions. Stone Sweet & Mathews define the “argumentation framework” as a discursive structure which organizes (a) how litigants plead their interests, and how they engage their opponent's arguments, and (b) how courts frame their decisions.

The remainder of this chapter provides retorts to the critique of proportionality from a variety of perspectives, two of which are of particular interest. The first facet of the discussion focuses on legal arguments and submissions; the second considers the proportionality argumentative framework in relation to the psychology of decision-making. On closer examination, it will become clear that these two perspectives are, in fact, different aspects of the same argument. My claim, which has both legal and psychological dimensions, is that the value-laden balancing act at the core of proportionality is more efficiently conducted through a standard-like discursive framework, rather than through more flexible, intuitive, and improvising decision-making technique.

All things being equal, I argue, under conditions of uncertainty and unpredictability, the accuracy of decision-making by means of an algorithmic procedure — specifically, the proportionality formula — will always outperform relaxed and undisciplined balancing. Strictly speaking, it is all about the dichotomy between intuition and procedural constraints and hence, as is so often the case in law, tertium non datur.

Making the case, however, is not without its problems. As I elaborated earlier, it is not clear what proportionality’s sources of modern articulation are and how its four-prong discursive frame can be (legally and epistemologically?) accounted for. Since the most notable feature of proportionality is that it is based on the notion of *structured and formalized* discretion,\(^{405}\) one logical starting point would be proportionality’s formalized nature. Positions in the current debate might therefore usefully be divided into three strands, according to which the proportionality framework is:

1. over-formalized;
2. under-formalized;
3. fallaciously formalized.

The ‘over-formalized’ strand of criticism deals with issues partially canvassed earlier. If balancing is inherently embedded in rights adjudication, and justified on that basis,\(^{406}\) why is proportionality needed? Is there any doctrinal or theoretical reason or need to turn a relaxed and intuitive balancing exercise into a discursive, vertically-structured 4-prong proportionality formula? As Grégoire Webber puts it, “there is nothing intrinsic to rights that would direct one to associate the ideas of proportionality” with “the process of practical reasoning”.\(^{407}\) Another line of criticism rests on the assumption that proportionality is too stringent a frame for

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balancing and, consequently, does not allow for sufficient flexibility in rights adjudication, proper attention to context, or evaluation of all necessary moral considerations.

In short, if one understands “balancing” in the sense of “balancing all the relevant considerations”, and if proportionality does not itself provide any moral content, but merely creates a discursive frame to assist judges in developing their own, “then why use proportionality at all, and why not just let judges focus on the important moral questions squarely?”

Indeed, notwithstanding the fact that proportionality has become common currency in the rhetoric of human rights law around the world, its introduction – or rather justification for its introduction – continues to confound commentators and practitioners alike. Of valuable assistance in the present context is the reasoning of other constitutional tribunals which face the challenge of justifying the invocation of “proportionality” language in their jurisprudence. The Federal Constitutional Court of Germany, for example, which some commentators consider as a source of inspiration for the Canadian Oakes test, has derived the principle of proportionality from the “essence of the fundamental rights themselves.” Likewise, the European Court of Justice approaches proportionality as a general principle of law which, together with the other general principles of law has the purpose of

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412 Apostol D Tofan, Discretionary power and the excess of power of public authorities (Bucharest: All Beck, Studii Juridice Collection, 1999) at 29.
controlling the EU community actions where there are express regulations in the specific field at European level.\textsuperscript{413} According to this account, it seems plausible to assume that proportionality might be inherent to human rights adjudication — something which provides it with common grammar all around the world — and therefore makes up a part of what David Law calls generic constitutional law.\textsuperscript{414} Jonas Christoffersen, speaking about the introduction of proportionality to the Strasbourg limitation clause jurisprudence, maintains that “the application of the principle felt so natural to the members of the Court that no thorough reasoning was thought to be required”.\textsuperscript{415} In a similar vein, David Beatty suggests that proportionality is an "essential, unavoidable part of every constitutional text".\textsuperscript{416} Robert Alexy, for his part, holds that, in the case of constitutional rights, proportionality is unavoidable because “there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right”.\textsuperscript{417} The most powerful argument, in my opinion, comes from the notion that proportionality “stresses the need to always justify limitation[s] on human rights”\textsuperscript{418}

\textsuperscript{416} David M Beatty, The Ultimate Rule of Law (New York: Oxford University Press, 2006) at 162.
In their recent article “Proportionality and the Culture of Justification,” Moshe Cohen-Eliya and Iddo Porat state the following;

Proportionality, we believe, is essentially a requirement for justification, which represents a profound shift in constitutional law on a global level. We characterize this, following South African scholar Etienne Mureinik, as a shift from a culture of authority to a culture of justification. At its core, a culture of justification requires that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e., in terms of proportionality.419

As argued by Kumm, proportionality is justified by a conception of legal legitimacy which is based on the ability of the state to demonstrate to its subjects the reasons and justifications for its actions - a process which Kumm terms “Socratic Contestation.” According to this conception, the courts, using proportionality, push the government to constantly provide a logical basis, and coherent reasons for its actions, which are crucial for the legitimacy of those actions.420

Proportionality, further, boosts the legal credentials of the court by making the decision-making procedure transparent and intelligible to participating legal actors – including those unsatisfied with the case’s outcome. In the metaphorical words of Alec Stone Sweet and Jud Mathews, “In situations where the judges cannot avoid declaring a winner, they can at least make a series of ritual bows to the losing party”.421

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Aharon Barak succinctly opines that proportionality “fulfills a dual function: On the one hand, it allows the limitation of human rights by law, and on the other hand, it subjects these limitations to certain conditions; namely—those stemming from proportionality”.\textsuperscript{422} Proportionality “expresses the idea that human rights are not absolute, but at the same time it makes it clear that the limitations themselves have limits”.\textsuperscript{423}

Creating a discursive frame for norm-based argumentation is thus meant to allow for transparency, predictability, and public appreciation of reasons for decisions in constitutional adjudication. In hard cases, and in the absence of clear legal rules, judges must make decisions which go beyond the limit of technical rationality and engage their political and moral sensibilities. They further typically do so on a case-by-case basis, which undermines the very idea of predictability in rights adjudication. The rationale for proportionality is therefore that it both presupposes, and creates a sense of, coherence. As Joel Bakan submits with respect to Canadian constitutional adjudication:\textsuperscript{424}

\[\text{the translation by the Court of section 1’s ambiguous and general language into a neat, four-step test was clearly an attempt to avoid case-by-case evaluation of legislation under vague standards such as “reasonable” and “demonstrably justified in a free and democratic society,” which unavoidably would appear to require questioning the wisdom and political desirability of particular laws.}\]

According to Alec Stone Sweet and Jud Mathews, “[u]nder conditions of supremacy (given a steady caseload), fidelity on the part of the court to a particular

\textsuperscript{423} Ibid.
\textsuperscript{424} Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 27.
framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it”.425

Here it is fitting to ask the question, what are the alternatives to a structured 4-prong argumentation framework of proportionality? The most plausible example comes from the jurisprudence of the European Court of Human Rights, which deploys the “fair balance test,” often referred to in the literature as “proportionality.” While most constitutional tribunals adhere to the strict-vertical, rigorous 4-component proportionality template, the ECtHR, unlike its counterparts, replaces the usual hierarchically ordered test with a flexible horizontal test. It does not, consequently, make proportionality dependent on fulfillment of one legal requirement after the other. It does not even require all four traditional sub-tests of proportionality – proper purpose, rational connection, minimum impairment, and proportionality stricto sensu – to be applied in a particular case. A characteristic example is the minimum impairment test which is often deprived by the ECtHR of the status of an independent legal criterion of proportionality. Similarly, more often than not the ECtHR’s “proportionality test” does not contain the requirement that, in order for there to be a rational connection between the means and the ends of the impugned legislation, the statute at issue should pass a strict – premised on the evidence – constitutional master, that is, supported with facts.

It may plausibly be argued that what affects the ECtHR’s approach to weighing the evidence – and to, in many cases, dismissing the need for evidence426 – is the

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margin of appreciation doctrine, as this is often interpreted to require deference to national legislatures. Yet, as Jeremy McBride rightly observes, “the danger that faces the Court, particularly if it allows the margin of appreciation to weaken the test of proportionality without at least articulating more fully the rationale for the differential approaches pursued, is that its own ruling might be seen less as principled evaluation and more as its own arbitrary preference for the balance to be achieved between different rights and interests”.

Yet another analogue to proportionality today is the set of standards that make up “reasonableness.” Proportionality and reasonableness share certain core elements and, as Aharon Barak points out, “in many common law countries, reasonableness was recognized long before proportionality”. In the metaphoric words of Michael Taggart, when proportionality “knocked at the door” of those legal systems, it was met by the concept of reasonableness. Yet proportionality has clear advantages. It has been more than forty years since Professor Stone noted that reasonableness belongs to “categories of illusory reference”. Further amplifying this point, Aharon Barak posits that we can “advance the discussion regarding reasonableness … by acknowledgement that reasonableness is not a physical or metaphorical concept. Rather, reasonableness is a normative concept…. Reasonableness is not bound by deductive logic. It is determined by the identification of the relevant considerations and their balancing in accordance with

426 See., e.g., Karlheinz Schmidt v Germany (No 13580/88) 1994 ECHR A 291 B.
430 J Stone, Legal System and Lawyers’ Reasonings (Stanford University Press, 1968) at 263.
their weight”.\footnote{Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 374.} While it may be argued that reasonableness, distilled to its essence, is really just a balancing exercise,\footnote{D Feldman, “Proportionality and the Human Rights Act 1998” in Evelyn Ellis (ed), The Principle of Proportionality in the Laws of Europe (Hart, 1999) at 127.} that view is belied by the fact in some cases, such as the Wednesbury version of reasonableness,\footnote{In the United Kingdom, the courts developed the Wednesbury test to resolve conflicts in administrative law (See Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 373)\footnote{Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 376.} \footnote{Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge, Cambridge University Press 2009) at 243.}} balancing is neither recognized or mentioned.\footnote{Jason Varuhas, “Keeping Things in Proportion: The Judiciary, Executive Action and Human Rights” (2006) 22:2 New Zealand Universities Law Review 300.} In other cases, reasonableness is indistinguishable from the rational component of proportionality. \footnote{Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 376.} When reasonableness and proportionality \textit{are} understood as similar, it is inevitably because each is conceived in terms of balancing. \footnote{Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge, Cambridge University Press 2009) at 243.} In the latter case proportionality is preferable to reasonableness. As I indicate throughout this chapter, its stringent standard-like reasoning, conceptualized as a 4-prong legal test, provides for greater transparency, predictability, and protection of human rights.

Inasmuch as alternatives to proportionality are concerned, another plausible parallel may be drawn to American jurisprudence, specifically American balancing (not to be confused with American categorization.) As noted by Moshe Cohen-Eliya & Iddo Porat in their recent article “American balancing and German proportionality”, the two tests, balancing and proportionality, resemble each other in important aspects which are often discussed in tandem.\footnote{Moshe Cohen-Eliya and Iddo Porat, Proportionality and the Culture of Justification (2011) 59. American Journal of Comparative Law 463 at} However, balancing has never attained the status of an established doctrine in American constitutional law in
the same way that proportionality has in European constitutional law. Moreover, balancing has always been the subject of fierce criticism and is very much a controversial concept in American constitutional law. From the 1950s onward, balancing has been at the center of a heated debated in the Supreme Court. As Richard Fallon recently described it: “balancing applications frequently draw outraged protests from dissenting Justices who contend that the Court has betrayed the staunch commitment to preserve individual rights”.438

Thus, in sum, proportionality has clear advantages if compared to all proposed alternatives. It gives some measure of coherence to adjudication by developing stable procedures for arriving at decisions; it allows for judicial transparency, predictability, and public appreciation. All in all, it articulates reasoning as an interplay of ideas and reality, abstract and concrete, form and substance, and, as Joel Bakan succinctly puts it, serves to make proportionality inquiry “look legal rather than political”.439

In concluding their joint article, Alec Stone Sweet and Jud Mathews endorse that:

Though we believe that PA, as a doctrinal framework for adjudicating rights claims, performs better overall than any known competitor, we do not argue that it solves all of the legitimacy dilemmas faced by courts, including the problem of judicial lawmaking. As we wrote: “The key to the political success of PA, its social logic, is that it provides a set of relatively stable, off-the-shelf, solutions to a set of generic dilemmas faced by the constitutional judge. If PA mitigates certain legitimacy problems, it also creates, or at least spotlights, an intractable, second-order, problem. PA does not camouflage judicial lawmaking. Properly employed, it requires courts to acknowledge and defend

439 Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997) at 27.
honestly and openly the policy choices that they make when they make constitutional choices”.

My central claim in this chapter, therefore, is that the best way to understand the misunderstanding between the proponents and opponents of proportionality is in terms of “proportionality deconstruction.” According to this account, all pro and con arguments about proportionality relate to different, and indeed separate, judicial techniques for reconciling conflicts between constitutional rights: explicit limitation of rights; balancing; and the proportionality doctrinal framework. In order to make a convincing case against proportionality, the mainstream canon of criticism should embrace two truths: that the concept of democracy presupposes not only rights, but also the possibility of their limitation; and that “balancing cannot be categorically banished from the temple of justice”.

As such, exercising balancing via the structured argumentative framework — of which proportionality is the most developed form — is more desirable than unconstrained judicial intuition, which inevitably indulges in unprincipled balancing.

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442 Ibid at 842.
CHAPTER 3: PROPORTIONALITY DEFENDED

3.1. Is Proportionality Possible Here?: Principles for a New Proportionality Debate

In the previous chapter, I proceeded on the assumption that the criticism of proportionality as a particular argumentative framework presupposes three basic claims: (i) that proportionality is an over-formalized normative frame for balancing; (ii) that proportionality is a fallaciously formalized framework; and, last but not least, (iii) that proportionality is an under-formalized doctrinal framework which provides too much room for judicial discretion. As I have already addressed the first two lines of critique in the previous section as well as highlighting deficiencies with proportionality competitors it is now that I turn to the last strand of analysis. In the understanding that balancing is inevitable, is proportionality indeed too low a standard for structuring normative considerations? If the answer is in the negative, then the question must be asked; how can we account for proportionality’s fallible performance? Indeed, how is it possible to provide a retort to the criticism that proportionality is but an “unmanageable license for judicial activism,” one that provides judges an illegitimately wide judicial discretion and, due to its ad hoc approach, undermines judicial certainty? All in all, speaking figuratively, if

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443 That is, correctness, reasonableness, and flexible horizontal proportionality framework (“fair balance”). Also, earlier in the text were addressed relaxed variations of absolute concept of rights and American tired review.
proportionality is not a hermetically sealed vessel, and indeed invites personal preferences of decision-makers whilst also lowering judicial certainty, where, then, is the leak, and how do we “fix it”? Even more importantly, to what extent, if at all, are we equipped to carry out these repairs?

This section is the beginning of Chapter III of the thesis, the last chapter, where I push the proportionality debate to its limit and suggest that, whether relaxed or robust, proportionality, just like any other judicial technique, cannot escape normative considerations and arbitrary judgments. I go on to explain why this is so and how the theory of epistemic unreliability in law may render valuable service in helping to understand it. I further introduce a new avenue for making a positive case for proportionality, and establish a framework for progress.

The remainder of this section will be organized as follows. In order to shed more light on the nature of proportionality and its shortcomings, I will begin by addressing the key arguments about proportionality’s under-formalization, which include, but are not restricted to, proportionality’s alleged unpredictable nature, its inability to restrain judicial discretion, its overall inability to provide for effective protection of constitutional rights and, taking up the figurative language of Matthias Klatt and Moritz Meister, “the moral infection of proportionality.” Among other things, the discussion regarding these proportionality shortcomings (which, although somewhat exaggerated, tend to ring true) will be informed by Alexy’s account of epistemic uncertainty in law recently augmented and refined by Matthias Klatt

I will subsequently make a case for strengthening proportionality’s methodology which, in order to reveal all proportionality’s benefits to the protection of rights, should move towards a greater reliance on rigidity and formalization of legal reason. Having examined the criticisms of proportionality, the benefits will be addressed. Blending legal, philosophical, sociological, and psychological arguments, as well as logic, theorized in a particular way, my ultimate conclusion will rest on the proposition that, while beneficial in many ways, proportionality is still flawed. This, together with the reconsidered canon of proportionality’s criticism, will pave the way for a fruitful discussion in the final sections of this thesis.

To begin with, the heavy criticism of proportionality revolves around the theory that the principle presents itself as (or at least creates a facade of having) scientific accuracy; it is in fact, actually based on judicial subjectivity. As Stavros Tsakyrakis succinctly puts it, “[t]he metaphor also suggests precision”, while the truth is that the test, being far from precise, indeed presupposes judicial uncertainty and unpredictability.

Reminiscent of such a perspective, as Matthias Klatt and Moritz Meister submit, is a famous objection to the proportionality test that it would abandon the standard of correctness in human rights cases in favor of standards like adequateness.

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450 Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 486. See also Lorenzo Zucchi, Constitutional Dilemmas: Conflicts of Fundamental Legal Rights In Europe and the USA (Oxford University Press, 2007).
or appropriateness. 452 This objection has been put forward against Alexy by Habermas,453 whereas Stavros Tsakyrakis also subscribes to it.454

Indeed, it might be said that proportionality, by damaging judicial certainty, provides for insufficient protection of constitutional rights. It is, however, but a tip of the iceberg. An increasing number of commentators criticize proportionality — and, in particular, the balancing conducted within proportionality stricto sensu — for providing judges with too wide a discretion.455 Central to such a submission is the argument that proportionality, by operating under a rubric of structured and seemingly intelligible procedure, camouflages much of the courts’ thinking and preferences underlying rights.

This takes me to yet another anti-proportionality argument, namely that proportionality, in the absence of a single and all-encompassing standard, allows for the imposition of moral arguments by judges upon societies in which they operate. Interestingly enough, Canadian commentator Barbara Billingsley recently presented an empirical survey of the history of the Oakes test where she submits that “in both Social Policy Cases and Criminal Cases, the Court most often divided on ... a combination of two or more of the proportionality factors .... [And that] the Oakes Test led to less consensus of result in Social Policy than in Criminal Policy Cases.” Billingsley attributes this to the fact that competing values are at play in the former, and different judges likely appraise them differently. She notes, for example, that “in

six of [eight divided policy cases between 1995 and 2003] either the majority or dissenting justices cast doubt on the definition, accuracy, or importance of the purported legislative objective(s).\footnote{Barbara Billingsley, “Oakes at 100: A Snapshot of the Supreme Court’s Application of the Oakes test in Social Policy v. Criminal Policy Cases” (2006) 35 SCLR (2d) 347 at 366–67.}

The problem is that, at some point, unconstrained judicial discretion may turn into judicial law-making, and, consequently, judicial governance. For the political scientist Alec Stone Sweet, for instance, “proportionality balancing” has emerged as a “master technique of judicial governance in the EU”.\footnote{Alec Stone Sweet, The Judicial Construction of Europe (2004) at 243–244.} Ran Hirschl comes close to adopting this position when he suggests that the introduction of the Charter into the Canadian constitutional dimension has been a result of the processes which lie beyond what can be encompassed by legal arguments. Specifically, he suggests in \textit{Towards Juristocracy},\footnote{Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004).} that judicial empowerment through constitutionalization in many “new constitutionalism” countries results from self-interested actions taken by hegemonic, yet threatened, sociopolitical groups fearful of losing their grip on political power. “Judicial empowerment through the constitutionalization of rights,” as Hirschl puts it, “is often not a reflection of a genuinely progressive revolution in a polity; rather it is evidence that the rhetoric of rights and judicial review has been appropriated by certain groups to bolster their own position in the polity.” \footnote{Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law” (2005) 53:1 A J C L 125 at 149.}

My concern here is not to elaborate on all lines of criticism which claim that the proportionality argumentative framework “leaks,” but merely to point out that all present argument, if not entirely untrue, still tell only a partial truth. For none of
them takes into account the very nature of judicial review and that in constitutional adjudication — or any adjudication for that matter — judges operate on the assumptions premised on questionable, and more often than not not highly contested, normative arguments and uncertain empirical propositions. Otherwise stated, judges operate under the condition of epistemic uncertainty, therefore being required to exercise epistemic discretion by virtue of the very nature of their task.

Indeed, the problem of epistemic discretion arises within the wider context of proportionality analysis. It is an often undertheorized answer to two kinds of questions which are raised by the ubiquitous nature of the proportionality test: First, because proportionality requires engagement with highly contested empirical and normative issues, how should decision-makers address those uncertainties, given their duty to respect rights?460 Second, there are questions relating to judges’ competencies to second-guess other actors, and particularly legislators, when assessing contested empirical and normative claims. When is it appropriate for a court to mistrust the facts established by state authorities?461

To begin with, in considering policy ramifications, which are by default the matter of “future”462 — that is considerations ex ante — the court always acts under the condition of factual uncertainty. In Canada, Justice La Forest offers an observation in McKinney463 which rings true: “[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society”. Future events cannot

460 Ibid at 70.
461 Ibid.
463 McKinney v The University of Guelph [1990] 3 SCR 229.
be “proved” or “disproved” in the conventional sense that facts relating to past events can be. As a theoretical experiment, take, for example, the potential impact of fully funding all private religious schools in a particular region. Some evidence is optimistic about the effectssuch an initiative, whilst some is not. However, the truth is, that such predictions cannot be proven in court; the only way to actually determine the impact of fully funding all private religious schools would be to fully fund all private religious schools, wait 30 or 40 years, and conduct a retrospective study. But public policy is made prospectively, not retrospectively, and in such matters educated guess-work is inevitable.

In the second place, in proportionality cases, the court often deals with polycentric problems – those which “involve a large number of interlocking and interacting interests and considerations”.464 Judicial fact-finding is deficient in this respect when compared with governmental fact-finding, which may allow for a more systematic assessment of polycentric issues through statistical and economic evidence, stakeholder input, and long-term financial and demographic planning. More than that, judicial assessment of policy issues tends to suffer from what Greschner and Lewis call “telescopic vision”: litigation is focused on a single aspect of a particular statute or government program, while missing the whole picture, or, if you will, failing to tell the whole story. In the words of Canada’s Supreme Court, a “particular legislative regime may have a number of goals and impairing a right minimally in the furtherance of one goal may inhibit achieving another goal”.465 All in all, an overview of the pertinent considerations demonstrate that proportionality is

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not a cure-for-all doctrinal tool because of the constitutional settings — both normative and empirical — in which judges operate, but not because of its internal shortcomings. By the same token, nothing in proportionality methodology speaks of the attenuation of rights — to the contrary. It is possible, in my submission, to conduct proportionality reasoning in a way which both enhances the protection of rights and maximizes the predictability and objectivity of judicial review. To this end, there is a need to grapple with the structure of the proportionality test in a rigorous, robust, and reflective way. Though not a cure-all solution for challenges faced by constitutional courts, proportionality can be understood as performing a number of important functions:

1. proportionality as a concept identifies a logical template of questions to be addressed;
2. proportionality involves placing upon public authority an important onus, of satisfying itself and the Court that there are proper answers;
3. proportionality provides for an intensive review by the courts as to the way in which all necessary questions are to be asked and answered.

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466 Note that in Section 1.2 of this thesis, I canvassed the historical development of proportionality that clearly demonstrates the principle’s invocation as an attempt to transit from unlimited state power to the so-called “culture of justification,” which, in turn, requires that governments to provide substantive justification for all their actions (in terms of the rationality, reasonableness, and proportionality), especially in face of danger to constitutional rights. See, e.g., Moshe Cohen-Eliya & Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59 American Journal of Comparative Law 463; Mattias Kumm, “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review” (2010) 4:2 L & Ethics of Hum Rts 141.

467 On the profound — and remarkably vivid — discussion on the advantages of formulaic, step-by-step, reasoning over mere intuition, see Daniel Kahneman, Thinking, Fast and Slow (Anchor Canada, 2013) at 222-233.

Further, the principle of proportionality “embodies fundamental standards of rationality” \(^{469}\) and has been described correctly as “a very powerful rational instrument.”\(^{470}\) Properly employed, it requires courts to acknowledge and defend — honestly and openly — the policy choices that they make, when they make constitutional choices. \(^{471}\) Otherwise stated, proportionality requires judges to explicitly address “inconvenient arguments” and provide the reasoning behind their decision.

Yet, insofar as the decision itself is concerned, a central question is: is it safe to equate justification and justice? If underpinned by profound proportionality reasoning, does the case outcome automatically render a right outcome? Does proportionality, as many claim, provide the infallible argumentation framework for the purposes of locating this right answer? Indeed, my question should really be reformulated thus: are there right answers?

### 3.2. Are There Right Answers in Law?: Setting the Scene for a Discussion

When in 1800, Napoleon Bonaparte appointed a commission to prepare a draft of a uniform civil code for France, he entrusted it with a task which was both ambitious and straightforward: to aspire to declare everything. The ultimate goal,
distilled to its essence, was to create an all-encompassing legal compendium which judges, whenever necessary, could consult so as to always find the right answers to their questions.

Indeed, the new Republican government sought to institute, among other reforms, a new legal system which would put an end to the long conflict between royal legislative power and, particularly in the final years before the Revolution, protests by judges representing views and privileges of the social classes to which they belonged. Such conflict led the Revolutionaries to take a negative view of judges making law. This is reflected in the Napoleonic Code’s prohibition on judges deciding cases by way of introducing general rules\textsuperscript{472} (Article 5),\textsuperscript{473} since the creation of general rules is an exercise of legislative rather than judicial power.

Even among drafters, however, the idea of all-encompassing law was viewed with skepticism. Some commissioners believed, for example, that “[t]he function of statutory law is to fix, in broad lines, the general maxims of the law, to establish principles that will be fecund in consequences, and not to descend to the details of questions that may arise in each subject. It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their applications”\textsuperscript{474} It has been said that the drafters were “disciples not prophets”\textsuperscript{475}

Arguably, this discussion among Civilians anticipates, by almost 170 years, what has been known in Anglo-American legal philosophy as the “Dworkin-Hart” debate. And yet, the

\textsuperscript{472} Compare with Dworkin’s account of legal principles.
\textsuperscript{474} Tom Holmberg, “The Civil Code: an Overview”, online: <http://www.napoleon-series.org/research/government/code/c_code2.html>
\textsuperscript{475} Compare with the points raised in Charney & Green, ”Prophets of Doom, Seers of Fortune: 20 Years of Expert Evidence Under the Oakes Test” (2006) 34 S.C.L.R. (2d) 479.
discussion – wherever and whenever it takes place – is nowhere near its conclusion. The questions remain: Is it possible to create a legal framework that would dictate judges what steps to undertake in order to reach the correct — and the only possible — answer? Do “right answers” even exist?

Kai Möller has recently argued, taking up a point made by Madhav Khosla, that the risk in criticizing proportionality is that critics too easily confuse the flawed performance of a proportionality exercise — in other words, the simple miscarriage of justice — with proportionality’s normative framework per se, which is indeed neutral and capable of producing the right answers:

the risk [...] is that a critic confuses author A’s theory or court C’s approach (or worse, court C’s one decision D) with the principle of proportionality itself. The fact that A’s theory, C’s doctrine, or decision D are wrong shows only this—that a mistake happened. It does not show that proportionality itself is an unattractive doctrine. It would never occur to anyone to argue that because Robert Nozick’s theory of justice is unconvincing, we should abandon the concept of justice.

To set the scene for a discussion, consider a theoretical experiment. Assume there is a hard constitutional case. Assume again, that there is a nonpartisan constitutional tribunal which, in determining the validity of a statute, applies both law and procedural standards in the most neutral fashion possible; in a similar vein, normative and empirical uncertainty of the case tends towards zero. The hypothetical

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478 Reminiscent in such perspective is argument by Madhav Khosla that “[W]hile proportionality can do much regarding unjust laws, it can ultimately do very little about poor judging.” (In Madhav Khosla, “Proportionality: An assault on human rights?—A reply” (2010) 8 Int J Constitutional Law 298 at 304).
may also assume that judicial review, as well as intrinsic proportionality analysis, is performed by Dworkinian superhuman jurist Hercules who never indulges in arbitrariness and, likewise, never makes mistakes. Is it safe to assume that the above would necessarily presuppose a proportionality outcome which is just, not value-laden, and, in the highest consideration, “the only solution possible”?

Slightly reformulated, the Möller argument suggests that, in order to get a “right” proportionality answer, our primary concern should be with asking the right question — not just any question under the proportionality heading. All in all, we must not argue, as Dworkin once cautioned, that “because judges will often, by misadventure, produce unjust decisions they should make no effort to produce just ones”.

Taking Dworkin’s argument as a starting point for my inquiry, I ask the question: can judges balance competing interests in an objective and impartial fashion? Can proportionality indeed be a tool for producing just decisions? Underlying this question is yet another concern: what is a just decision per se? Is it necessarily the only solution possible — or does there exist an array of correct solutions, just like concurrently existing parallel universes? In hard cases, is the law always the law? More particularly, “Are there right answers to proportionality questions?” a question that, in turn, requires we ask more generally “Are there right answers in hard cases?”

The quest for right answers in law may be based, as in Dworkin’s work, on an account of law as integrity and on certain working principles — of which

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479 According to Ronald Dworkin, all judges are by necessity philosophers, and no judge is a better philosopher than Hercules. Hercules and Herbert are introduced in Ronald Dworkin, “What Rights do We Have?” in Taking Rights Seriously (Oxford University Press, 1978) 266.

480 Ibid.
proportionality is the most emblematic example. Yet, at the end of the day, it is nearer to art than science. This quest requires case sensitivity, imagination,\textsuperscript{481} value-laden judgments, and careful application of normative and empirical knowledge which, as I have canvassed in the previous section, is always unreliable — although to varying degrees.\textsuperscript{482} This epistemic unreliability necessarily presupposes room for judicial latitude — that is, a freedom of choice. The arguments marshaled in the next section revolve around the possibility of this margin of freedom being justified, primarily within the theoretical framework of the “right answers” thesis and its implications for the discourse of proportionality.

### 3.3. Anti-Archimedean Defense of Proportionality

The purpose of earlier sections was to provide idealistic and skeptical accounts of proportionality. I have analyzed the merits and detriments of proportionality and established that — given that balancing in rights adjudication is inevitable — proportionality is an unequalled doctrinal underpinning for making balancing disciplined, transparent, and, in a sense, coherent.

\textsuperscript{481} Consider, for instance, the following passage from Illinois Elections Bd. v. Socialist Workers Party 440 US 173 at 188-189 per Blackmun: “[a] judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.” In a similar vein, the Supreme Court of Canada has posited on numerous accounts that common sense considerations may serve as a valuable substitution to empirical backup of the case: See, e.g., RJR-MacDonald v Canada [1995] 3 SCR 199 where McLachlin J (as she then was) noted, at para 154, that in some cases, the relationship between the infringement of the rights and the benefit sought to be achieved may not be “scientifically measurable.” In such cases, she continued, “this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective.” Similarly, see, Canadian Broadcasting Corporation v New Brunswick (AG), [1996] 3 SCR 480; R v Sharpe, 2001 SCC 2, Harper v Canada (Attorney General), 2004 SCC 33.

\textsuperscript{482} For a pertinent discussion, see my observation of epistemic unreliability in the previous section.
Now, as my line of analysis draws to a close, I will be concerned with proportionality’s realistic dimension. As established in Section 3.1, however robust and stringent it may be, proportionality, like any other judicial technique, is unable to escape normative considerations and value-laden judgments. Does this mean proportionality is invalid as an adjudicative technique? If proportionality’s analytical matrix allows for flexibility and leaves room for judicial discretion, may the final outcome still be called “right” and “correct”? These are notorious puzzles about proportionality’s legal and democratic credentials – both with regard to the suitable articulation of the problem and in framing an agenda for a valid proportionality justification.

I will not pretend to have made any philosophical news here; the fundamental problems about the “right answers” theory are well known and their implications well understood. The suggestion I would like to make concerns the ways in which these

483 To take nobody but Dworkin, the literature on his “right answers” theory is immense. The most emblematic accounts of this thesis may be found in Ronald Dworkin, “No Right Answer?” in Law, Morality and Society: Essays in Honour of HLA Hart (Peter M.S. Hacker & Joseph Raz eds., 1977) 76; Ronald Dworkin, A Matter of Principle (Cambridge, MA: Harvard University Press, 1985), and Ronald Dworkin, “Hard Cases” in Taking Rights Seriously 107-110. Furthermore, it may be said to permeate, as a methodological assumption, all strands of his discussions about law. But compare this with Dworkin’s submission in “The Right answer Farrago” (in Ronald Dworkin, Justice in Robes (Harvard University Press, 2006) at 41):

483 My theory about the right answer in hard cases is [...] a very weak and commonsensical legal claim. It is a claim made within legal practice rather than at some supposedly removed, external, philosophical level. I ask whether, in the ordinary sense in which lawyers might say this, it is ever sound or correct or accurate to say, about some hard case, that the law, properly interpreted, is for the plaintiff (or for the defendant). I answer that, yes, some statements of that kind are sound or correct or accurate about some hard cases. (In fact, I say that some such statements are characteristically or generally sound in hard cases. But we can ignore that more ambitious statement in this discussion about the kind of claim I am making). [...] 

483 Legal theorists have an apparently irresistible impulse [...] to insist that the one-right-answer theory must mean something more than is captured in the ordinary opinion that one side had the better argument in Cruzan. They think I must be saying not just that there are right answers in some ordinary way, as an unselfconscious lawyer might say, but that there are really right answers, or really real right answers, or right answers out there, or something else up the ladder of verbal inflation. Their mistake is just Rorty’s mistake: Thinking that they can add or change the sense of the position they want to
theoretical observations may shed light on proportionality’s underlying concerns. What I will attempt to show is that the critics of proportionality are getting the discussion wrong: for not only the possibility of judicial discretion under proportionality enables judges to adopt a context-sensitive approach to resolving competing rights claims – and, hence, to protect the rights better – but it is the discursive proportionality frame that prevents judges from going in their interpretation “too far” and that ensures the feasibility of reaching the “right answers” to rights adjudication questions.

In what follows, I make the case for proportionality. After highlighting the most contentious issues within the “right answers thesis” debate I demonstrate that the best way to defend proportionality as a doctrinal framework is through a conception of law as a system. Every system is *prima facie* rational, and rationality is in need of a common metric. I argue as a first step towards finding a foundation for legal and democratic justifications of proportionality as a standard of review. To that end, I will distinguish between two approaches to justify proportionality: one from the standpoint of formal (external, Archimedean\textsuperscript{484}) rationality, and the other from

\textsuperscript{483}If the skeptical no-right-answer theory has any practical importance at all, therefore, it must be treated as itself, not a metaphysical but a legal claim. It claims that, contrary to ordinary lawyers’ opinion, it is a legal mistake to think there are right answers in hard cases. So understood it stands or falls by legal argument. Philosophy and morality are certainly, and in many ways, pertinent to that legal argument. Legal positivists, for example, have argued that the one-right-answer thesis must be wrong, in law, as a matter of logic or semantic [...] Members of the Critical Legal Studies movement point to what they take to be pervasive internal contradictions in legal doctrine that, if they exist, would rule out right answers. [...] Moral skeptics, including John Mackie, defend a kind of internal moral skepticism that, if sound, would also defeat the possibility of right answers. No doubt other arguments with legal bite can and will be deployed in favor of the internally skeptical view. But these are legal arguments; if successful they call for reform, and if successful they can be made without the crutch of inexplicable metaphor.

\textsuperscript{484}I elaborate upon the respective concepts below.
the viewpoint of rationality which may be called substantive (and therefore internal, non-Archimedean.) I will argue that the latter — which focuses on personal considerations of judges rather than adherence to a particular procedure — may serve as a genuine and natural justification for proportionality.

That point made, the anti-Archimedean justification for proportionality may be provided from different theoretical standpoints. In a sense, even legal positivism — with Kelsen’s pure theory of law being its most emblematic example[^485] — is of substantial help here. Recall that the problem of the hierarchy of legal norms — where the “higher” legal norm authorizes the enactment of the lower legal norm, and thus confers a legal validity upon it — reaches a dead-end in a fashion strikingly similar to the counter-majoritarian difficulty.

At some point the chain of authorization comes to an end. There is no higher legal norm which authorizes the enactment of Constitution, which is deemed to confer legal validity upon all legal material in the relevant legal system. At this point, Kelsen famously argues that one must presuppose the legal validity of the Constitution. As Kelsen sees it, there is simply no alternative. More precisely, any alternative would violate David Hume's injunction against deriving an “ought” from an “is”.[^486]

The issue observed is not unrelated to the proportionality quandary because the chain of proportionality’s justifications inevitably reaches an end. In the previous chapter, I have presented my line of reasoning as follows:

[^485]: Hart’s theoretical account of the hierarchy of norms resembles that of Kelsen in many respects.
(1) the legal validity of proportionality as a doctrinal tool for rights limitation is justified by the very nature of each and every legal system and the relative, as opposed to absolute, nature of rights;

(2) the legal validity of balancing is justified by the nature of rights adjudication;

(3) the legal validity of proportionality as a particular balancing framework, that is, the introduction of the proportionality test into the relevant legal system, is justified by the requirements of the respectful system to make legal reasoning transparent and predictable.

Yet again, at some point, the chain of authorization comes to an end. For, as has been canvassed above, proportionality does not escape judicial discretion, which is dictated by the very nature of rights adjudication, namely, epistemic unreliability of assumptions upon which all arguments in a case at bar are premised. An all-encompassing Napoleonic Code was but the Utopia, and so is every attempt to create an argumentation framework which would declare all steps judges are supposed to undertake in reaching a final decision. Proportionality is not a hermetically sealed vessel, and its leakiness — the invasion of its “moral infection” — however small, is inevitable. This discretion, hence, is in need of justification. But how can it be accounted for? What is the condition of proportionality’s validity?

My answer in this connection is very similar to that of Kelsen. While by no means do I endorse the main theses of his jurisprudence, I agree with him that to validate a legal framework, in this case proportionality — and the inevitable judicial discretion —

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487 See, especially Section 3.1 of this thesis.
discretion it entails — we need to presuppose. Kelsen himself noted that legal norms necessarily come in systems. There are no free-floating legal norms. 489 This systematic unity is what is meant to be captured by the following two postulates:

1. Every two norms that ultimately derive their validity from one basic norm belong to the same legal system.

2. All legal norms of a given legal system ultimately derive their validity from one basic norm.

Whether these two postulates are actually true is a contentious issue. Joseph Raz argues that they are both inaccurate, at best. Two norms can derive their validity from the same basic norm, but fail to belong to the same system as, for example, in case of an orderly secession whereby a new legal system is created by the legal authorization of another. Nor is it necessarily true that all the legally valid norms of a given system derive their validity from the same basic norm. 490 As Andrei Marmor submits, however, even if Kelsen errs about the details of the unity of legal systems, his main insight remains true, and quite important. It is true that law is essentially systematic, and it is also true that the idea of legal validity and law's systematic nature are very closely linked. 491

This view is echoed in Dworkin's “law as integrity” theory. Though he and Kelsen stand on different methodological footings, and also capture the components of the so-called “system” in different manners, at the core of each of their theories is the

view that legal phenomena, to successfully operate, must assume harmony, integrity, and an underlying system. Which raises the question - What underlies a system? Clearly, its most prominent features are rationality and reason. Rationality, in turn, is in need of a common metric. As Vlad Perju describes it, an objective common metric can be located in the structure of a constitutional system in a number of ways. It can be described as necessary for the existence of secondary rules which solve conflicts of norms within any constitutional structure. It would be impossible for courts to adjudicate the validity of myriad governmental limitations on rights without such a common metric. As David Beatty puts it: “A constitution without some principle to resolve cases of conflicting rights would be incoherent: it just wouldn’t make any sense.”

With respect to rationality, there are different accounts of the concept, some of which are deeply contested. For my purposes, to create a sense of orientation in the remainder of the section, I will draw on Weberian famous taxonomy and focus on formal (meta-, or external) and substantive (internal) rationality. The proponents of the former purport to take on a morally neutral, Archimedean point of view on

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492 A closer look at a theoretical and philosophical account of the unity and systematic nature of the legal system is to be found in Section 2.1 of this thesis.
493 Max Weber, for instance, has argued that rational-legal forms of authority such as the contemporary legal and judicial systems are examples of formal rationality.
494 Compare with Hart’s and Kelsen’s accounts of “rules of recognition.”
497 See, e.g., the submission of Arthur Ripstein who asserts that “[f]rom Plato to Habermas, philosophers have sought to find some standpoint outside of the human practices which puzzled them from which to evaluate those practices” or “Plato and Habermas […] promise to provide a secure point that will enable us to stand above the fray of normative argument and resolve the disputes that animate it” (Arthur Ripstein, “Introduction: Anti-Archimedeanism” in Arthur Ripstein (ed.) Ronald Dworkin (Cambridge: Cambridge University Press, 2007) 1-21 at 1, 6, 7).
498 Put simply, an Archimedean point in philosophy represents a vantage point which lies outside of the observer. The idea, distilled to its pith, is to "remove oneself" from the object of study so that one
textual analysis and interpretation, therefore providing justification to legal reasoning from a procedural standpoint and within a discourse of formal validity. However, the latter approach adopts the *internal* (anti-Archimedean) insight, which relies on the value content of all assumptions upon which particular reasoning is premised. Pushed to its limits, the distinction between the two approaches may be boiled down to a simple question: Do we adopt a standpoint outside or inside of our cognitive act? In other words, where are the answers to legal questions to be found: within the formal fabric of law or within the inner perspective of a particular decision-maker?

To begin with, one of the most prominent external justifications of proportionality’s objectivity may be found in the works of Robert Alexy. The claim of the correctness-argument is a central part of Alexy’s theory of legal argumentation. The German commentator famously claims that “morality cannot be justified by morality, because such a justification would necessarily become circular”. Alexy, hence, defends the rationality of the claim to correctness in law on the basis of the

can see it in relation to all other things, but remain independent of them. Such an approach supposedly offers a “neutral”, “objective” and “true” look on the totality of meaning. The concept is generally traced back to different authors, who describe Archimedes’ famous remark “give me a place to stand and I will move the earth.”

For a brisk account of the formal-procedural concept of general (instead of particularly legal) rationality, consider the passage from Habermas: “[t]he unity of rationality in the multiplicity of value spheres rationalized according to their inner logics is secured precisely at the formal level of the argumentative redemption of validity claims. [...] [A]rgument or reasons have at least this in common, that they, and only they, can develop the force of rational motivation under the communicative conditions of a cooperative testing of hypothetical validity claims” (Jurgen Habermas, The Theory of Communicative Action. I. Reason and the Rationalisation of Society (trans. T. McCarthy; Cambridge: Polity Press) at 249).

According to Dworkin, the necessity of taking an internal point of view does not preclude the possibility of truth or objectivity. Quite to the contrary — this anti-Archimedeanism, as he calls it (see Ronald Dworkin, Justice in Robes) allows for taking into consideration all normative presuppositions inherent in moral reason. In so stipulating, he proceeds on the account that judicial reasoning is inevitably value-laden, and there exists an ultimate unity of values (see Ronald Dworkin, Justice for Hedgehogs (Cambridge, MA: Harvard University Press, 2011)).

This presupposes, in turn, that all descriptions always assume evaluation; and evaluation cannot be morally neutral and extraneous to the agent who makes a decision.


possible rationality of morality itself and, by proceeding on this assumption, endeavors to provide a justification to proportionality by means of focusing on its procedural aspects, specifically on careful assessment of all its underlying presuppositions with respect to the context of each particular case.

For these purposes, and undoubtedly in line with the rationalistic foundations of the external approach I have outlined above, Alexy has recently mathematized his famous weight formula. It concerns the crux of the proportionality inquiry – the balancing test, which entails balancing the concrete – as opposed to abstract – weight of the individual right (in the numerator) and competing public interest (in the denominator). The components of Alexy’s formula are as follows:

\[ W_c = \frac{W_{a_1} \cdot I_1 \cdot R_1}{W_{a_2} \cdot I_2 \cdot R_2} \]

\( W (c) \) stands for the concrete weight of individual right and competing public interest, respectively. The right part of the formula comprises three variables. The first – \( W (a) \) – stands for the abstract weight of the individual right or public interest.

Variable \( I \) stands for the intensity of interference with the right and public interest (governmental objective). The formula considers the intensity of interference with each principle on a triadic scale ranging from “slight” to “moderate” to “severe;” each degree of interference becomes geometrically more difficult to justify.

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505 “Although [...] principles cannot determine an answer in every case governed by them, they may be complemented by a theory of legal argumentation revealing a single correct decision”, Joaquin R.-Toubes Muniz, “Legal Principles and Legal Theory” (1997) 10 Ratio Juris 267 at 271-7).
Finally, the formula comprises the variable $R$, which stands for the empiric reliability of the premises underlying proportionality considerations. The concept of epistemic reliability was addressed in Section 3.1 in a wealth of detail.

Having elucidated Alexy’s approach to rationalizing proportionality, it is now that I turn to an interesting and, in a sense, unparalleled approach to locating an Archimedean point in proportionality’s justification. For Canadian scholar David Beatty, the standpoint which allows decision-makers to “remove themselves” from the object of consideration is adherence to facts. Should a judge remain detached from “the substantive values” at stake in a case and look to the evidence? Beatty argues that “the right answer is usually pretty clear”.507 The right answer is less clear and mistakes occur, as he submits, when one allows one’s own evaluation of the significance of a law to influence the analysis.

As Grégoire Webber observes, by emphasizing empirical evidence and the parties’ own understandings of the significance of the law for them, Beatty’s account of proportionality seemingly renders proportionality factual; it is therefore objective in the sense that it does not, according to Beatty, require evaluation. The facts speak for themselves.508 Beatty espouses a view that this process is possible; that if a judge lets the facts and the parties speak for themselves, the judge will “know just by looking, just by sight” which answer is correct. Yet, as Grégoire Webber has ironically observed, in reading The Ultimate Rule of Law, one quickly comes to the conclusion that “facts speak to Beatty more clearly than they [do] to [his] readers”.509

509 Ibid.
Both scholars, Alexy and Beatty, as we have seen, endeavor to take a step back from value- and policy-laden proportionality considerations. They further claim to provide a defense to proportionality which would be extraneous to its normative underlying assumptions and, therefore, neutral. Yet these approaches are unsustainable; and for the following reason.

Proportionality provides a set of workable standards, which can also serve as constraints for judicial deliberation. Yet these external standards — just like everything external — are limited in their efficiency; what can really be of assistance in this respect are internal constraints — which judges impose upon themselves. Proportionality helps judges manage disputes which take a particular form; it does not dictate correct answers to legal problems, at least under a conventional understanding of the term.

Contrary to many popular accounts, Dworkinian theory has never set out to provide one right answer to any given case, but instead asserts that one right answer is possible, on moral grounds. Whether there is a right answer “depends, plainly, on complex, highly theoretical issues of substantive morality”, and Dworkin defends on moral grounds, premising his assumptions on his conception of law as integrity, that there is in fact one right answer.

Dworkin endorses a theory that, as long as judges write opinions as though they believe that they are discovering answers in legal materials rather than simply filling gaps and resolving ambiguities, their answers are right in a sense that they are rationally (from an internal standpoint) justified. That belief itself, as Mike Dorf puts

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511 Ibid at 137
it, probably plays an important role in shaping and constraining what the positivist believes is the judge’s discretion.512

So, in terms of a common metric, it would be the attitude of the particular judge that may justify their reasoning, however un-ideal that reasoning might be from some methodological standpoints. Thus, as Aharon Barak states, even when discretion is used, in hard cases, subjectively, this subjectivity is meant to achieve the proper balance and not to advance one’s personal worldview. Although this judicial subjectivity513 is recognized, it is meant to achieve the proper solution determined according to objective considerations.514 Thus complete objectivity can never be achieved within the framework of proportionality, although the same is true for any of the proportionality alternatives.515

In *Shavit v Rishon Letzion Jewish Burial Society*, Aharon Barak, then President of the Supreme Court of Israel, has espoused a view so clear and sound, that I am going to provide his citation in full:

My colleague, Justice Englard, complained that using balancing to measure the degree of harm to sensibilities is subjective for every judge. He dismisses the consideration and evaluation of the different sensibilities because of their personal and subjective nature and because the dispute at hand is a matter of “personal ideology.” I do not argue with the conclusion that, at a certain stage, subjective perspectives become considerations. [...] I do not ignore the personal nature of the decision. Nevertheless, it is important to remember that only a small proportion of the considerations are subjective. The principal

work of a judge is dictated by a stratified system of objective considerations. These are required by the foundation documents; these were used in previous judgments; these are shared by each and every judge. In truth, a ruling is always value-based, but this does not mean that it is subjective. Most value-based judgments are objective, and are mandated by the values of the system. A competent judge is able to implement this system by differentiating between objective considerations and his or her personal, subjective views. That is how it has always been done. The many difficulties bound up with the personal perspective versus the occasional need for a subjective decision do not diminish the standing of legal values and principles and the need to balance them at the point of friction. We do not want to regress to a jurisprudence of concepts (Begriffsjurisprudenz) in which the conclusion supposedly arises, as if on its own, from objective considerations. We prefer the jurisprudence of interests (Interessenjurisprudenz) and the jurisprudence of values (Wertungsjurisprudenz) in which an “ideological” decision is required. We prefer substance over form. All these allow us to arrive at an objective decision, which is not personal to each and every judge, even if it is based in “ideology.” In any case, this needs to be the model, while at the same time we acknowledge that sometimes there is no avoiding a subjective ruling. This is the “price” – it is worthwhile to pay it in order to ensure justice.\footnote{Shavit v Rishon Letzion Jewish Burial Society [1999] CA 6024/97 IsrSC 53(3) 600 [internal references omitted I.P]. See also Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press, 2012) at 497; Ronald Dworkin, “Objectivity and Truth: You’d Better Believe It” (1996) 25 Phil & Pub Aff 87 at 135.}

To conclude, I shall reiterate the question that has underpinned my line of analysis throughout the last few sections: are there “right answers” to proportionality questions? On the face of it, the “right answers” theory is either true or false. My argument in this connection is that it is true, but in a nuanced rather than absolute way.

Proportionality does create an unparalleled formal structure to judicial argument and ensures just and, in a sense, correct outcomes by providing 1) a conceptualized normative frame for debating contentious value- and policy-laden issues; and 2) a direct link to the contextual factors in a constitutional dispute, thus
bridging the domain of abstract principles and concrete contexts; 3) some flexibility in respect of how these principles and contexts are to be interpreted and applied.

This possibility of leeway, like a coin, has two sides to it. For while it allows judges to successfully operate under conditions of epistemic unreliability and serves as machinery for furthering the common good, it may also be a rhetorical cover for judicial law-making. In the chain of norms’ legitimization, there are simply no reviewing bodies above constitutional tribunals. The only solution possible, then, is to presuppose that a judge, as a rational agent of producing the right answer by means of proportionality decision engineering, does so in a way which best coheres with both societal beliefs of his community and standards imposed by proportionality framework. This is not to assert that the foregoing societal beliefs are vectors pointing in the same direction – to the contrary. It has always been and always will be the case that society may disagree on the core ethical and moral values because, as Duncan Kennedy posits, “all normative concepts are infected with an unresolvable conflict”. However, these facets of the normative universe do not grow or develop at the expense of each other – but alongside each other. The contradiction between them, according to Hegel, is the source of all motion or vitality – as is any contradiction in general. The judge in a democracy, hence, performs a task of balancing these normative considerations in order to find an equilibrium point – this plays an indispensable role in forming the virtues upon which liberal democracy is premised. Although a decision rendered will always to be, in a sense, “ideological,”

517 Here, I leave aside what in Canadian scholarly discourse is known as a dialogue principle.
my chief argument in this connection is very simple and that is that the legal validity of the case outcome is easier to presuppose – for judges themselves, but also for the parties in the dispute – if the open texture of balancing which underlies judicial considerations is constrained by a conceptualized and well structured template of proportionality; one that depends on the fulfillment of one legal requirement after the other.

Regardless, as I have already canvassed in Section 2.2, the legal universe has more to it than categorical answers; there are no A and -A dichotomies, nor is there black and white, or absolute right or wrong. Everything depends on the perspective of the beholder and their attitude. Attitude, in turn, depends on rationalization and justification. Dworkin’s “right answers” theory, in this respect, is no exception. Proportionality, by introducing value- and policy-laden judgments, does not jeopardize the objectivity of the final decision. Quite the contrary – by means of creating a normative frame for right-based considerations it ensures transparency and coherence in judicial reasoning. Norms and values are inherent parts of the law. Law is integrity. Law is a novel or play. At the risk of seeming too poetic, law, better yet, is a musical piece; proportionality, then, is sheet music – each performer will play it differently. However, as long as judges believe that what they are doing is not expressing their own beliefs, but those of society as a whole, proportionality allows for achieving societal harmony – true and objective. Contrary to many popular accounts, judges are not a threat to this harmony – but are instead its guardians.

520 As discussed in Section 2.3 of this thesis, in constitutional adjudication, balancing is inevitable either way.
521 See Ronald Dworkin, Law's Empire (1986) at 228-238.
CONCLUSION

The aim of this thesis was to inquire into, critically explore, and justify the conceptual foundation of proportionality — a discursive judicial technique for adjudicating disputes concerning measures intruding on protected rights and the deleterious effects of those intrusions. Notwithstanding some signs of triumph — proportionality was hailed, *inter alia*, as “the overarching principle” in constitutional law and “the universal criterion of constitutionality”523 — a growing number of commentators sympathetic to strong theories of human rights have argued that it is not clear how to account for proportionality’s invocation into judicial reasoning and whether recourse to its regulative ideas “is at all helpful in resolving the difficult questions involved in struggling with rights-claims”.524 Against these concerns I have pressed three linked arguments: first, that the mainstream canon of proportionality criticism has failed to get the matters conceptually and analytically correct so that, paraphrasing Dworkin, people who praise or disparage proportionality may not actually agree about what they are praising or disparaging525; second, that proportionality, while not a cure-all for challenges faced by constitutional tribunals, indeed allows for objective and impartial protection of human rights through disciplined and focused reasoning process and, in doing so, performs better than all existing doctrinal alternatives; and, third, that proportionality is overall normatively and institutionally

defensible. It is also my position — which has been demonstrated in the course of this thesis rather than argued for as a separate point — that recourse to proportionality as a formal structure to argument is not a whimsical perpetration of constitutional judges but rather a comprehensive adjudicative phenomenon that has been historically, doctrinally, and institutionally predetermined.

Drawing on Max Weber’s theory of formal and substantive rationality, I have provided justification for proportionality on two levels. From the standpoint of formal rationality, as has been extensively canvassed in Chapters 1 and 2, I argued that judicial functions are better served under procedural constrains of the multi-pronged proportionality’s analytical frame that allows for transparency, predictability, and public appreciation of reasons for judicial decisions. And that is precisely why, when the moral and political stakes are high, as in constitutional adjudication, the courts worldwide tend to embrace the rigid skeleton of proportionality that pushes governmental actors to constantly demonstrate to

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526 It is of important note that a growing number of constitutional commentators appear to make a case for linking proportionality’s domain and famous Weberian typology of rationality. For instance, in his recent article David Schneiderman emphatically argues that the mainstream account of proportionality — and especially the reasons for proportionality analysis to spread across jurisdictions — should be reconsidered in the light of Weber’s sociology of law (David Schneiderman, “Judging in Secular Times: Max Weber and the Rise of Proportionality” (2013), forthcoming in Supreme Court Law Review (2d), currently available at <SSRN: http://ssrn.com/abstract=2313822>) Jacko Bomhoff, for his part, posits as follows: “one of the most important debates on balancing in Europe turns, to a large extent, on the “formal rationality” – in the Weberian sense – of balancing as legal argument. Discussions of this dimension, in turn, seem to be lacking from the voluminous American literature on balancing. [The European debate] has taken place between Jürgen Habermas and Robert Alexy. […] Although Alexy does not label his argument as such, it is clear that his defense proceeds on the basis of a “formal” conception of rationality, in accordance with Max Weber’s famous typology” (Jacco Bomhoff, “Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law” (2008) 31 Hastings Int & Comp L Rev 555 at 574-75)

527 Moshe Cohen-Eliya and Iddo Porat have argued in their recent treatise that Weber considered formal rationality as almost the “twin brother of liberty,” since it prevents the government from
public the reasons and justifications for their actions. On the level of substantive rationality — and this is the crux of my argument in Chapter 3 — I have provided proportionality with a so-called anti-Archimedean type of justification which is premised upon the idea that rationality exists as a manifestation of man's internal capacity for value-rational action — and cannot be satisfactorily captured by external or procedural arguments alone. Following up with Dworkin's “right answer” thesis, I used it to juxtapose proportionality and judicial ambitions for objectivity in a new theoretical light.

To set the scene for discussion, I began with genealogical reconstruction of proportionality, then inquired into its conceptual preconditions and established that, whether explicitly or in disguise, proportionality reasoning is premised upon a balancing process. From the outset, I specifically rejected arguments to the contrary arguing that, whether conceptualized as a weighing exercise or rhetorically framed as a “means/ends” analysis, proportionality cannot escape balancing because, as Robert Alexy strongly asserts, “there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right”.528 Indeed, whilst there is something attractive about banning balancing “from the temple of justice,” upon closer examination it becomes clear that no formal structure to value-laden argument can eschew it. Against this background, the issue appears in clearer focus. Given that at the core of proportionality lies balancing and that balancing in rights adjudication is inevitable, why rights-protecting courts around the world do not address it openly and explicitly? Put

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differently, the question at the forefront of this research is: what is so appealing about the proportionality framework, especially in the face of criticism it has stimulated? As I strived to provide a detailed description of the foregoing critique and sought to demonstrate that most streams of criticism suffer from severe limitations, three of proportionality’s dimensions framed the discussion. Specifically, I have focused on critical exposition of proportionality as a “rights limitation tool,” as a “balancing exercise,” and, finally, as a “multi-pronged analytical test.”

As I went on to explain in Chapter 3, it is this latter discursive multi-pronged frame that invests proportionality with doctrinal appeal too hard to resist. Whilst, strictly speaking, constitutional adjudication cannot be exercised as a mechanical process\(^{529}\) (Weber, for instance, argues that we shouldn’t conceive of the “modern judge as an automaton into which legal documents and fees are stuffed at the top in order that it may spill forth the verdict at the bottom, along with reasons, read mechanically from codified paragraphs”\(^ {530}\)) this is not to say that the conflicts between constitutional values and interests can never, from a theoretical perspective, be properly reconciled. Nor does it mean that the answers to all proportionality inquiries blatantly reflect the individual preferences of judges, although under different “headings.” Elaborating on Dworkin’s presupposition on the unity of values\(^ {531}\) and law as integrity,\(^ {532}\) I believe there is an

\(^{529}\) The arguments about the non-mechanical nature of human rights reasoning revolve around two major problems: (1) epistemic unreliability of premises upon which proportionality reasoning is based, which is in tension with the “cool matter of factness” of formal legal reasoning; (2) the fact that constitutional rights are drafted in an open-ended manner fashion that grants judges too much power to interpret their meaning.


\(^{532}\) See, Ronald Dworkin, Law’s Empire (1986).
ultimate *unity of interests* in the state, and that the judiciary is the body entrusted to locate where within the constitutional dimension all interests *equilibrate.*

Thus, it may be the case – and indeed it is quite plausible to assume – that the very nature of multi-faceted democracy presupposes what T Roux calls a “constructive tension” between competing interests and values. Enabled to harmoniously co-exist through the balancing process, these facets of democracy “develop alongside the other facets, not in their place”. More fundamentally, perhaps, my argument is informed by Plato’s understanding of the unity of virtues, and an account of proportionality that flows through all aspects of his work. Proportion inheres in the soul and in the city and in the universe; it is built into the very structure of the cosmos – and by extension of the city and the soul, according to Plato. The need for symmetry, balance, and proportional relationships lies deep within the human psyche, even while proportionality means too little or too much when viewed in the abstract, on its own.

In addressing the aforementioned issues, as I went through my line of analysis, I also strove to shed more light on the tension between the “triumphant success of proportionality” and the severity of its criticism. Furthermore, key questions, pursued through the thesis, included: Is it possible to create a mechanical legal formula? Can we ascribe a truth-value to the content of legal norms? Can a right be defeated by a powerful utilitarian justification? Are neutrality and impartiality in law possible? Are there right answers to legal questions?

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533 Food for thought: Does the judiciary really balance, or is it supposed to check out the balancing performance of the legislator?
In the end, raising and illustrating these problems, even without claiming to provide comprehensive answers, puts us slightly ahead of where we were initially. Indeed, the explanatory gap in proportionality discourse remains, but it does not demonstrate a gap in law — but a gap in our understanding of law. As researchers articulate this, they may become more aware of the nature of what judges really do when operating under the rubric of the “proportionality test,” and thus come up with suggestions for them on how to do it better.
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