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## Constitutional Law in an Age of Proportionality

**ABSTRACT.** Proportionality, accepted as a general principle of constitutional law by many countries, requires that government intrusions on freedoms be justified, that greater intrusions have stronger justifications, and that punishments reflect the relative severity of the offense. Proportionality as a doctrine developed by courts, as in Canada, has provided a stable methodological framework, promoting structured, transparent decisions even about closely contested constitutional values. Other benefits of proportionality include its potential to bring constitutional law closer to constitutional justice, to provide a common discourse about rights for all branches of government, and to help identify the kinds of failures in democratic process warranting heightened judicial scrutiny. Earlier U.S. debates over “balancing” were not informed by recent comparative experience with structured proportionality doctrine and its benefits.

Many areas of U.S. constitutional law include some elements of what is elsewhere called proportionality analysis. I argue here for greater use of proportionality principles and doctrine; I also argue that proportionality review is not the answer to all constitutional rights questions. Free speech can benefit from categorical presumptions, but in their application and design proportionality may be relevant. The Fourth Amendment, which secures a “right” against “unreasonable searches and seizures,” is replete with categorical rules protecting police conduct from judicial review; more case-by-case analysis of the “unreasonableness” or disproportionality of police conduct would better protect rights and the rule of law. “Disparate impact” equality claims might be better addressed through more proportionate review standards; Eighth Amendment review of prison sentences would benefit from more use of proportionality principles. Recognizing proportionality’s advantages, and limits, would better enable U.S. constitutional law to at once protect rights and facilitate effective democratic self-governance.

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**INTRODUCTION**

“Proportionality” is today accepted as a general principle of law by constitutional courts and international tribunals around the world.<sup>1</sup> “Proportionality review,” a structured form of doctrine, now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims.<sup>2</sup> The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law.<sup>3</sup> Yet some areas of U.S. constitutional law embrace proportionality as a principle, as in Eighth Amendment case law,<sup>4</sup> or contain other elements of the structured “proportionality review” widely used in foreign constitutional jurisprudence,<sup>5</sup> including the inquiry into “narrow tailoring” or “less restrictive alternatives” found in U.S. strict scrutiny.<sup>6</sup>

Justice Stephen Breyer has suggested that there are other areas in which the appropriate standard of judicial review would involve examining the proportionality of government regulation.<sup>7</sup> For example, in *United States v. Alvarez*,<sup>8</sup>

1. In 2004, Canadian scholar David Beatty asserted that proportionality review was the “ultimate” rule of law for resolving constitutional questions about rights; as a positive matter, it was the dominant method of constitutional interpretation in the world, and as a normative matter, it was superior to such other methods as originalism or textualism. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159-88 (2004). In 2005, U.S. legal scholar David Law identified proportionality as a “generic” component of constitutional adjudication around the world. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). On the role of proportionality in international law and administrative law, see, for example, HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel, 58(5) PD 807 [2004] (Isr.), translated in 2004 ISR. L. REP. 264. See also Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105, 113 (1993).
2. The German Constitutional Court has been particularly influential, as has the Canadian Supreme Court, in developing “proportionality review” in ways that influence other countries. On how seemingly similar approaches may be applied or understood differently in different countries, see JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013) (comparing U.S. and German conceptions of balancing); and Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).
3. See Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009) [hereinafter Cohen-Eliya & Porat, *The Hidden Foreign Law Debate*]; see also MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 14-16 (2013) [hereinafter COHEN-ELIYA & PORAT, *PROPORTIONALITY*].
4. See, e.g., *Graham v. Florida*, 560 U.S. 48, 59 (2010); see also cases cited *infra* notes 43-44.
5. See generally Steven Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008).
6. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).
7. See STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 49 (2006). Justice Breyer’s interest in proportionality as an approach to analyzing rights goes

Justice Breyer's concurrence, joined by Justice Kagan, associated proportionality review with intermediate scrutiny and applied this standard to evaluate a First Amendment challenge to the Stolen Valor Act.<sup>9</sup> In his dissent in *District of Columbia v. Heller*,<sup>10</sup> Justice Breyer explicitly invoked the idea of proportionality as a guide to permissible regulation under the Second Amendment.<sup>11</sup> This explicit invocation of proportionality led some scholars to begin to consider, critically, the prospects of proportionality review, as it has developed elsewhere in the world, being more fully embraced in the United States.<sup>12</sup>

Given developments within and outside the United States, the time is ripe to take a fresh look at proportionality, both as a general principle in constitutional analysis and as a structured doctrine of potential benefit to discrete areas of U.S. constitutional law. In 1987, T. Alexander Aleinikoff criticized U.S. constitutional law for its overreliance on balancing in doctrines like strict scrutiny and in cases like *Tennessee v. Garner*<sup>13</sup> or *Mathews v. Eldridge*,<sup>14</sup> where the Court aimed to strike a balance among different interests.<sup>15</sup> Other work soon followed, contrasting more categorical and rule-like approaches, on the one hand, and standards, on the other.<sup>16</sup> The scholarship of the late 1980s may have in-

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further back. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 535-41 (2001) (Breyer, J., concurring); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 835-47 (2000) (Breyer, J., dissenting); see also Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 157-66 (describing Justice Breyer's concurrence in *Bartnicki v. Vopper*—in which Justice Breyer analyzed whether the challenged “restrictions on speech . . . are disproportionate”—as demonstrating a more “flexible” approach in recognizing “competing constitutional interests” between privacy and free speech); cf. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (arguing that reviewing court should consider “whether there are significantly less restrictive ways to achieve Congress’ over-the-air programming objectives, and . . . whether the statute . . . strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences”).

8. 132 S. Ct. 2537 (2012).

9. See *id.* at 2551-52 (Breyer, J., concurring in the judgment).

10. 554 U.S. 570 (2008).

11. *Id.* at 682, 690 (Breyer, J., dissenting).

12. See Cohen-Eliya & Porat, *The Hidden Foreign Law Debate*, *supra* note 3, at 378-84, 395-408 (discussing “balancing” as “the exception,” not “the rule,” in the United States); see also COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3.

13. 471 U.S. 1 (1985).

14. 424 U.S. 319 (1976).

15. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-48, 968, 982-83, 989-91 (1987).

16. See generally, e.g., Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

fluenced case law in some areas towards more categorical rules.<sup>17</sup> But these earlier U.S. debates could not have been informed by the subsequent course of proportionality review in other countries. Foreign courts' experience with proportionality review casts new light on these enduring questions in ways that suggest that U.S. constitutional law would benefit from a moderate increase in the use of proportionality.

Proportionality can be understood as a legal principle, as a goal of government, and as a particular structured approach to judicial review. As a principle and as a goal of constitutional government, proportionality is a "precept of justice,"<sup>18</sup> embodying the idea that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less severe ones.<sup>19</sup> Proportionality as a principle is embodied in a number of current areas of U.S. constitutional law: for example, in Eighth Amendment "cruel and unusual punishments" and "excessive fines" case law; as a limit imposed by the Due Process Clause on the award of punitive damages; and in Takings Clause cases requiring "rough proportionality" between conditions on zoning variances and the benefits of the variance to the property owner. In each of these areas, the principle of proportionality imposes some limit on otherwise authorized government action, a limit connected to a sense of fairness to individuals or a desire to prevent government abuse of power. Proportionality is centrally concerned with how, in a "democratic society, . . . respect for the dignity of all men is central,"<sup>20</sup> reflected in "our Nation's [longstanding] belief in the 'individuality and the dignity of the human being,'"<sup>21</sup>

Proportionality as a structured legal doctrine is used by some (not all) courts that treat proportionality as a general principle. In countries like Germany, Canada, and Israel, courts use a similar multi-part sequenced set of

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17. See *infra* note 307. Compare, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402-03, 406-07 (1963) (applying a compelling interest standard to review claims for religious accommodation from generally applicable laws), *with Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) (rejecting claims for "accommodation" of religious practices as against generally applicable laws).

18. *Weems v. United States*, 217 U.S. 349, 367 (1910) (linking "justice" and its requirement that punishments be proportional to the severity of the crime to the Eighth Amendment's cruel and unusual punishment ban).

19. See *id.*; ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102-04 (Julian Rivers trans., 2010) (describing the "Law of Balancing" as follows: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other").

20. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

21. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 41 (2004) (O'Connor, J., concurring in the judgment) (citation omitted).

questions;<sup>22</sup> elsewhere, such questions are considered but in a less sequenced way.<sup>23</sup> In Canada, for example, structured proportionality review begins with attention to the scope of what a right is intended to protect; if a right has been infringed, the inquiry turns next to the authority for the action, and to the importance and legitimacy of the government purpose. If an infringement on interests protected by a right is shown, and if the challenged action has been “prescribed by law” sufficiently precisely and for a legitimate and sufficiently important purpose, then the constitutionality of the *means* used are examined through a three-fold inquiry into: (a) rationality; (b) minimal impairment; and (c) proportionality as such.<sup>24</sup> Several of these criteria correspond with elements in U.S. “strict,” “intermediate,” or “rational basis” scrutiny: the need for a sufficiently important or “compelling” government purpose; the rational connection required between the means chosen and the end; and the “minimal impairment” inquiry into whether there are less restrictive means towards the same goal.

Structured proportionality analysis in countries like Canada, Germany, or Israel includes an additional stage—“proportionality as such”—asking whether the intrusion on the challenger’s rights can be justified by the benefits towards achieving the important public goal. This step calls for an independent judicial evaluation of whether the reasons offered by the government, relative to the limitation on rights, are sufficient to justify the intrusion. While this step is sometimes referred to as involving “balancing,” the “proportionality as such” question in structured proportionality doctrine differs from “balancing” tests

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22. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 179-81, 188-89, 208-10 (2012) (describing proportionality doctrine in Germany, Canada, and Israel); see also *id.* at 181-87, 190-206 (describing proportionality principles or doctrine in the two transnational European courts, Ireland, England, New Zealand, Australia, South Africa, Central and Eastern Europe, Asia, and South America); Susan Kiefel, *Proportionality: A Rule of Reason*, 23 PUB. L. REV. 85, 86 (2012) (describing how proportionality in Australia is not regarded as a general principle, as in many parts of the world, but is used in constitutional law to test the limits of constitutional legislative authority). On proportionality in the European Union, see de Búrca, *supra* note 1.

23. See Niels Petersen, *Proportionality and the Incommensurability Challenge—Some Lessons from the South African Constitutional Court* 2 (NYU Sch. of Law, Pub. Law Research Paper No. 13-07, 2013), <http://ssrn.com/abstract=2230454> [<http://perma.cc/936Y-HTYG>] (describing how South Africa rejected the “structured” sequenced approach to hold that the factors listed in Section 36 of its Constitution must be “considered in an overall assessment” (citation omitted)).

24. See R. v. Oakes, [1986] 1 S.C.R. 103, 139 (Can.). Sometimes proportionality is used in less formally structured analyses focusing more broadly on the reasonableness of the means chosen in light of the nature of the right and the government’s justification for its actions. See *infra* notes 116, 194-95, 198, 201, and accompanying text.

that tend to focus primarily on quantification of net social good, as in *Dennis v. United States*<sup>25</sup> or *Mathews v. Eldridge*.<sup>26</sup>

Take Canada as an example of structured, sequenced proportionality analysis. First, “proportionality as such” is a part of a doctrine that, as a whole, prioritizes the right, putting the burden of justification on the government.<sup>27</sup> In this respect, structured proportionality analysis differs from “multi-factor” analyses of proportionality, as one sees in some countries, including South Africa,<sup>28</sup> or from some U.S. “striking a balance” case law. Second, Canadian-style proportionality review is a logically sequenced set of inquiries that limits the need to consider whether the government interests justify the intrusion on interests protected by rights. It does so by first examining whether the challenged action is authorized by law, and then whether the government’s purpose is sufficiently important to serve as a basis for limiting the right at all. If these first tests are met, Canadian proportionality review examines the rationality and necessity of the means chosen, all before reaching the final “proportionality as such” inquiry. In this way, if the means chosen are not suitable or necessary to advance the government’s interest, the case can be resolved at one of these stages: the courts need not reach the “proportionality as such” question unless there is a genuine conflict between the government’s interest and the interests protected by the right.<sup>29</sup> Third, “proportionality as such” returns courts to considering both the infringed-on right and the government’s purposes, not just in terms of their theoretical gravity, but in terms of the *relative* weight or bearing of the government’s reasons in relation to the harm to the challenger’s rights, in a particular context and in light of constitutional values.

25. 341 U.S. 494, 510 (1951) (plurality opinion) (suggesting that whether prosecution violates First Amendment depends on “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”).

26. 424 U.S. 319, 335 (1976) (establishing that resolving procedural due process questions “requires consideration of three . . . factors: First, the private interest . . . affected . . . ; second, the risk of an erroneous deprivation . . . through the procedures used, and the probable value . . . of [other] procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional . . . requirement[s] would entail”). A significant feature of such a formulation is the apparent absence of any prioritization of the underlying right to a fair hearing; the *Mathews* test suggests a kind of quantifiable cost-benefit inquiry, without giving clear weight to the basic procedural values of fair hearings for those singled out for adverse government treatment. See generally Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (suggesting that the failure of *Mathews* lies in “its focus on questions of technique rather than on questions of values,” *id.* at 30).

27. *Oakes*, 1 S.C.R. at 136-37.

28. S. AFR. CONST., 1996, § 36; *S. v. Manamela and Another* 2000 (3) SA 1 (CC) at 29 ¶ 32 (S. Afr.); see Petersen, *supra* note 23.

29. See KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 193-94 (2012).

In this way, courts are not “substituting” their judgment for that of the legislature.<sup>30</sup> They are playing a valuable judicial role—checking to assure appropriate attention to rights within a framework of constitutional justice.

Part I provides background for considering proportionality in the United States. It notes several areas of U.S. constitutional law in which proportionality already is an element of constitutional analysis and argues that one of the goals of the Constitution was to produce a just government, one likely to avoid arbitrariness and to act proportionately. As further background, Part I goes on to describe in more detail the structured form of proportionality review as it exists in several foreign countries, with special focus on Canada.

Part II explores why proportionality has not been used as a general principle of constitutional law in the United States. It suggests that the aversive impact of *Lochner v. New York*<sup>31</sup> and *Dennis v. United States*,<sup>32</sup> as “negative precedents,”<sup>33</sup> led to a search for categorical approaches to constrain judicial discretion. Moreover, the age of the Constitution and related interpretive practices help account for the absence of any general embrace of proportionality. For example, the Constitution’s brevity and, relatedly, the relative dearth of rights that are viewed as in tension with each other, have tended to reinforce a view of rights either as trumps<sup>34</sup> or as prohibited reasons for government ac-

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30. On how much attention legislators can give to constitutional values, a wide range of views exists. Compare, e.g., Jennifer Nedelsky, *Legislative Judgment and the Enlarged Mentality*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 95 (Richard W. Bauman & Tsvi Kahana eds., 2006) (expecting “intermittent conscious reflection” by legislators to constitutional values), with Ruth Gavison, *Legislatures and the Phases and Components of Constitutionalism*, in THE LEAST EXAMINED BRANCH, *supra*, at 198, 198–99 (treating constitutional interpretation as primarily for courts, not legislators).
31. 198 U.S. 45 (1905).
32. 341 U.S. 494 (1951).
33. See Jack Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 76 (2007) (describing negative precedents as illuminating “how judges should *not* decide cases, what the Constitution does *not* mean, and what we as Americans do *not* stand for”); see also Richard A. Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (describing negative precedents as “texts that are important but normatively disapproved”); cf. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 388–89 (2011) (offering citation analysis of negative precedents that puts *Lochner* and *Dennis* in the six most often negatively cited cases, but arguing that the “anticanon” is actually smaller and depends on historical contingencies more than incorrect or immoral reasoning or result).
34. This is an idea associated with Ronald Dworkin, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi, 90–100, 190–97 (1977), though perhaps contestably so, see Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 LAW & ETHICS HUM. RTS. 78, 85 n.29 (2010); see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–53 (1974) (discussing rights as “side constraints”).

tion.<sup>35</sup> These conceptions contrast with alternative understandings of rights as presumptive protections of human interests<sup>36</sup> or as values to be optimized,<sup>37</sup> which some leading theorists link with proportionality review. And, unlike European countries, which have incentives to harmonize national constitutional law with international rights regimes that rely on proportionality, the United States has not been comfortable treating its international human rights obligations as judicially enforceable domestically.<sup>38</sup>

Part III makes an affirmative case for greater use of proportionality as a principle and for structured proportionality as a standard of review in the United States. I begin by looking at discrete areas of U.S. constitutional law, starting with Fourth Amendment cases like *Atwater v. City of Lago Vista*,<sup>39</sup> with rigid rules allowing police to detain and search regardless of the severity of the offense—rules that facilitate humiliating and badly intentioned police conduct. Excluding proportionality considerations neither fulfills the purpose of the Fourth Amendment nor promotes respect for the Constitution as law. Canadian case law on analogous rights offers an alternative approach. I then consider a recent First Amendment case, *Holder v. Humanitarian Law Project*,<sup>40</sup> that appears to depart from existing categorical rules. Applying structured proportionality analysis in this case, I suggest, would require more disciplined attention both to free speech and national security interests, in order to clarify which considerations control.

Next, I discuss some general normative arguments in favor of structured proportionality review and proportionality principles. First, Canadian-style proportionality review promotes structured and transparent decisions through

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35. See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that the purpose of the presumption against content-based regulation is the likelihood of illicit government purpose for such regulation).

36. See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993) (conceiving of rights as “shields,” protecting rights-holders from intrusion unless the government action is sufficiently justified).

37. See ALEXY, *supra* note 19, at 47–50 (describing most constitutional rights not as “rules” but as “principles” that require optimization). Alexy’s work has been widely influential. See, e.g., Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 93–96 (2008) (discussing Alexy’s contributions).

38. See, e.g., Declaration 1, U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781–01 (daily ed. Apr. 2, 1992) (“[T]he provisions of articles 1 through 27 of the Covenant are not self-executing.”); *Medellín v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

39. 532 U.S. 318 (2001); see also *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), discussed *infra* note 176.

40. 561 U.S. 1 (2010).

a stable methodological framework. Second, proportionality as a principle helps bring constitutional law closer to constitutional justice. Third, proportionality principles and structured proportionality review provide a better bridge between courts and other branches of government, offering criteria for constitutional behavior that are usable by, and open to input from, legislatures and executives. Fourth, proportionality analysis can reveal process failures, including departures from impartial governance, warranting heightened judicial scrutiny.

Part IV takes up several objections to proportionality review—that it is irrational, insufficiently protective of rights, unduly intrusive on legislatures, or overempowering of courts—and responds to each. I give special attention to the concern that proportionality review might focus too much attention on governmental justifications for its means and not enough on deontological understandings of rights. I suggest that more deontological understandings of rights, and attention to particular constitutional texts and lines of cases, is appropriate both in initially defining whether a right has been infringed and what ends are legitimate, and also in evaluating “proportionality as such.” Part IV also considers arguments from American exceptionalism that would preclude greater use of proportionality review. Exceptionalist claims, however, cannot be made or answered in broad brushstrokes; indeed, I argue, U.S. history and experience support greater use of proportionality.

Although some scholars view case-by-case application of proportionality analysis as almost always normatively superior to other approaches to rights adjudication,<sup>41</sup> Part V takes a different view. Text, history, and precedent matter. Not all rights have the same structure nor serve the same purposes; free speech claims, which benefit from a presumptively categorical structure, are different from police behavior or criminal sentences, both of which would benefit from greater attention to proportionality. Even in adjudicating a single claim, different issues may call for different treatment. In equal protection law, paying more attention to disproportionate effects need not imply embrace of all elements of structured proportionality doctrine. Moreover, sometimes the most “proportionate” results will be achieved through categorical rules, especially when remedial frameworks are considered.<sup>42</sup> At least some of these rule-like regimes can be justified in terms of proportionality analysis at the level of the rule. Being proportional about proportionality means recognizing that history

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41. See BEATTY, *supra* note 1; cf. MÖLLER, *supra* note 29, at 24, 75-90, 180 (describing the purpose of constitutional rights as ensuring that autonomy interests are protected through justifications under proportionality and balancing tests, though noting limited areas not subject to proportionality review or to all its sub-tests).

42. Further, the distinction between case-by-case application and articulation of more general rules is overstated in any legal system committed to consistency. See *infra* note 343.

and text have roles to play, and that proportionality as a principle is not always served by proportionality as a doctrine.

## I. PROPORTIONALITY IN U.S. CONSTITUTIONALISM AND ABROAD

Proportionality as an element of constitutional doctrine has already been recognized in several areas of contemporary constitutional law in the United States. This is not surprising, since well-designed constitutions are generally intended to promote proportionate, non-arbitrary government behavior. What the United States does not presently use is the structured “proportionality doctrine” described in Part I.C.

### A. Proportionality Principles Already Recognized in U.S. Constitutional Law

Americans are already familiar with the legal principle of proportionality in constitutional law. The Eighth Amendment’s case law has long recognized that punishments grossly disproportionate to the severity of the offense are prohibited as cruel and unusual punishment,<sup>43</sup> although the Court’s willingness actually to scrutinize the proportionality of sentences has varied over time and contexts.<sup>44</sup> The Excessive Fines Clause of the Eighth Amendment has also been

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43. See, e.g., *Graham v. Florida*, 560 U.S. 48, 59 (2010) (“The concept of proportionality is central to the Eighth Amendment.”); *Solem v. Helm*, 463 U.S. 277 (1983) (assessing the proportionality of a sentence of life imprisonment); *Enmund v. Florida*, 458 U.S. 782 (1982) (assessing the proportionality of a death penalty sentence); *Weems v. United States*, 217 U.S. 349, 367 (1910) (arguing that the Eighth Amendment ban on cruel and unusual punishment embodies the “precept of justice that punishment for crime should be graduated and proportioned to offense”). Although the Justices making up the majority in *Harmelin v. Michigan*, 501 U.S. 957 (1991), were divided on whether proportionality review applies in non-capital cases, *Weems* had applied such review to a punishment of hard labor for a term of years. In so doing, *Weems* was consistent with earlier Supreme Court comments on the meaning of the Eighth Amendment. See *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 480 (1867) (suggesting that Eighth Amendment clauses as a whole prohibited punishments that were “excessive, or cruel, or unusual”); cf. *O’Neil v. Vermont*, 144 U.S. 323, 331 (1892) (quoting a lower court opinion construing the Eighth Amendment and an analogous state constitutional provision to ban “excessive,” “oppressive,” or “unreasonably severe” punishments, but for other reasons rejecting an attack on a lengthy sentence imposing cumulative time on multiple counts); see also *infra* notes 425–426.

44. For example, from 1983, when *Solem*, 463 U.S. 277, was decided, until *Graham*, 560 U.S. 48 (2010), the Court did not invalidate any sentence of imprisonment for disproportionality under the Eighth Amendment. But since 1977, the Court has invalidated capital sentences for rape of an adult, *Coker v. Georgia*, 433 U.S. 584 (1977); for felony murder by one who did not personally kill or intend or attempt to kill, *Enmund*, 458 U.S. 782; for rape of a child, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); and for persons with mental retardation, *Atkins v. Virginia*, 536 U.S. 304 (2002), or who were juveniles at the time of the conviction offense, *Roper v. Simmons*, 543 U.S. 551 (2005). In *Graham* the Court held unconstitutional a life

understood to impose proportionality limits.<sup>45</sup> Since the 1990s the Court has invoked proportionality in several other constitutional contexts. For example, under the Due Process Clause, courts must now ensure that the measure of punitive damages in civil cases “is both *reasonable and proportionate* to the amount of harm to the plaintiff and to the general damages recovered.”<sup>46</sup> Under the Takings Clause, conditions for zoning permits must have “*rough proportionality*” to the effects of the proposed use of the property.<sup>47</sup> Furthermore, the “undue burden” standard is now the controlling inquiry in the Court’s abortion cases, invoking in its language and application a concern for the reasonableness of regulations affecting women’s choices to abort their pregnancies prior to viability.<sup>48</sup> All of these standards invoke proportionality in resolving individual rights questions, as do Justice Breyer’s First Amendment opinions.<sup>49</sup> Moreover, the Court has extended proportionality standards to federalism issues: as of 1997, legislation under Section 5 of the Fourteenth Amendment must have “congruence and proportionality” to conduct that Section 1 prohibits.<sup>50</sup>

As these examples suggest, U.S. courts have found the concept of proportionality increasingly attractive in resolving interpretive challenges, prompting scholars to identify the roots of proportionality doctrines in U.S. constitutional law. Richard Fallon, for example, has drawn comparisons between European proportionality doctrine and U.S. strict scrutiny as it emerged in the 1960s (and applied thereafter),<sup>51</sup> while Alec Stone Sweet and Jud Mathews see proportionality review in nineteenth century Dormant Commerce Clause cases.<sup>52</sup> Attraction to proportionality in both the courts and the academy is no surprise,

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without parole sentence for a juvenile convicted of a non-homicide offense; in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held unconstitutional mandatory life without parole sentences for juveniles convicted of homicide, concluding that imposition of such a sentence required individualized consideration.

45. See *United States v. Bajakajian*, 524 U.S. 321 (1998).
46. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) (emphasis added). See generally *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (limiting punitive damages under the Due Process Clause).
47. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 398 (1994).
48. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.).
49. E.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2551-52 (2012) (Breyer, J., concurring in the judgment).
50. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).
51. See Fallon, *supra* note 6, at 1295-96, 1330-34.
52. See Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 814-24 (2011); cf. E. THOMAS SULLIVAN & RICHARD S. FRAZER, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009) (arguing for greater recognition of proportionality as a principle across areas of law).

since an aspiration to proportionate government, as an important aspect of justice, is implicit in the constitutional design.

### B. Proportionate Government as a Goal of Constitutional Design

The Constitution's Preamble states that one of its goals is to "establish Justice," echoing the defining commitments of leading state constitutional instruments of the time.<sup>53</sup> "Justice" has, at least since the time of Aristotle, been associated with proportionality.<sup>54</sup> Although the Preamble does not contain independently operative grants of power, it nonetheless provides important background for understanding constitutional purposes relevant to the interpretation of the operative provisions that follow.<sup>55</sup> Similarly, there are allusions to proportionality in the Federalist Papers, where the constitutional design is described more generally as aimed to produce "a wise and well-balanced govern-

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53. See A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 454 (1968) ("[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." (quoting VA. DECLARATION OF RIGHTS § 15 (1776))); *id.* at 458 ("Every subject of the commonwealth . . . ought to obtain right and justice freely . . . ." (quoting MASS. DECLARATION OF RIGHTS 1780 § XI)); *id.* at 459 ("A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government." (quoting MASS. DECLARATION OF RIGHTS 1780 § XVIII)).
54. On proportionality in distributive justice, see ARISTOTLE, NICOMACHEAN ETHICS 162-63 (Sarah Broadie ed., Christopher Rowe trans., Oxford University Press 2002) (c. 384 B.C.E.); in corrective justice, *id.* at 163-67; BARAK, *supra* note 22, at 175-78 (identifying the philosophical and historical origins of proportionality as part of justice); *see also* Eric Engle, *The General Principle of Proportionality and Aristotle, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE* 265, 265 n.2 (Liesbeth Hupperts-Cluyseenaer & Nuno M.M.S. Coelhio eds., 2013) ("Aristotle's ideas of justice as ratio and virtue as mean explain the application of . . . proportionality to distributive and commutative justice—respectively, social justice (proportional shares in the constitution of the Polis, i.e. the State) on the one hand and proportional punishment of crimes on the other."). On the Founders' familiarity with proportionality as an element of justice in criminal sentencing, see Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 515 (2005); and John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 927-47 (2011).
55. The Preamble's reference to "Justice" has been invoked by both Justices Stevens and Scalia in Supreme Court opinions. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (quoting the Preamble's reference to "establish Justice" as a purpose of the Constitution); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 54-55 (1994) (Stevens, J., concurring) ("[I]t is entirely appropriate for a court to give controlling weight to the Founders' purpose to 'establish Justice.'"); *see also* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993).

ment for a free people”<sup>56</sup> in a way that will help control “abuses”<sup>57</sup> and avoid the exercise of “arbitrary and vexatious powers.”<sup>58</sup>

These sorts of commitments to government that is just, and to proportionality in the government’s treatment of citizens, have deep roots in antecedents to the U.S. Constitution, including the Magna Carta. The Magna Carta’s articles on “Amercements” plainly expressed a demand for proportionality in the imposition of fines;<sup>59</sup> other provisions of the Magna Carta called for “justice” to be provided through the law courts.<sup>60</sup> As Dick Howard has shown, the Magna Carta’s influence was felt in the American colonists’ demands for recognition of their rights as English citizens in accordance with colonial charters;<sup>61</sup> the influence of the Magna Carta and the English Bill of Rights<sup>62</sup> is further reflected in founding period state constitutions, in requirements that no

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56. THE FEDERALIST No. 2, at 39 (John Jay) (Clinton Rossiter ed., 1961).

57. THE FEDERALIST NO. 9, at 75 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

58. THE FEDERALIST NO. 12, at 94 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 23 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the “means ought to be proportioned to the end” in the design of government powers); THE FEDERALIST NO. 28 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The means to be employed must be proportioned to the extent of the mischief.”); THE FEDERALIST NO. 31 (Alexander Hamilton) (stating that, with respect to taxation, “the means ought to be proportioned to the end”).

59. See Magna Carta, ch. 20 (1215), reprinted in A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 42 (1998) [hereinafter HOWARD, MAGNA CARTA] (“A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position . . . ”); *id.* ch. 21 (“Earls and barons shall be amerced . . . only in proportion to the measure of the offense.”); *id.* ch. 22 (providing for similar limitations on amercements on “a clerk’s lay property”). Howard’s work reproduces the English translation of the 1215 Magna Carta text found in the British Museum, Cotton MS August II.106, with “emendations aimed mostly at achieving readability without sacrificing authenticity.” HOWARD, MAGNA CARTA, *supra*, at 34. For an argument that the Excessive Fines Clause of the Eighth Amendment should be understood more broadly than it currently is, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014).

60. See Magna Carta, ch. 40 (1215) reprinted in HOWARD, MAGNA CARTA, *supra* note 59, at 45 (providing that justice is to be neither for sale nor denied nor delayed); *see also id.* ch. 39 (stating that a free man is not be prosecuted “except by the lawful judgment of his peers and by the law of the land”).

61. HOWARD, *supra* note 53, at 14-132, 170-87; *see also* A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9 (2007).

62. The English Bill of Rights of 1689 is an important source for the text of the Eighth Amendment. See An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2, § 10 (Eng.) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . ”).

“cruel and unusual” punishments nor “excessive fines” be imposed,<sup>63</sup> as well as in the right to open courts.<sup>64</sup> Both Massachusetts’s and Virginia’s post-revolutionary constitutions emphasized “justice” and “moderation” as among the first virtues of the governments they sought to establish.<sup>65</sup> Similar requirements are evident in most modern constitutions in constitutional democracies, and even when not explicit, the goal of proportionality is implicit in any constitution that aims to produce justice by limiting as well as empowering government.<sup>66</sup>

Proportionality bears a special relationship to government in a constitutional democracy. For an essential idea of constitutional democracy is that in confrontations between citizens and government, government is restrained and avoids oppressive and arbitrary action.<sup>67</sup> The means to achieve this goal are varied, but requiring proportionality of action is one way in which the idea of

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63. See HOWARD, *supra* note 53, at 206-11 (discussing Virginia’s bill of rights and Massachusetts’s constitution). At least nine of the thirteen original states’ constitutions included some such prohibition. See DEL. DECLARATION OF RIGHTS § 16 (1776); MASS. DECLARATION OF RIGHTS art. XXVI (1780) (forbidding any magistrate or court to “inflict cruel or unusual punishments”); MASS. BODY OF LIBERTIES § 46 (1641); MD. DECLARATION OF RIGHTS art. XXII (1776); N.H. BILL OF RIGHTS art. 33 (1784); N.Y. BILL OF RIGHTS § 8 (1787); N.C. DECLARATION OF RIGHTS art. X (1776); PA. CONST. art. IX, § 13 (1790); PA. CONST. § 38 (1776) (punishments to be made “less sanguinary and in general more proportionate to the crime”); S.C. CONST. art IX, § 4 (1790) (prohibiting “cruel punishments”); VA. DECLARATION OF RIGHTS § 9 (1776) (banning “excessive fines” and “cruel and unusual punishments”). For a discussion of proportionality of punishment requirements in early state constitutions, see Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 793-95 (2008). As Balmer notes, some early constitutions prohibiting disproportionate punishment were revised to prohibit “cruel and unusual” punishments; at least one state court concluded that the change in wording was not intended to abandon a proportionality requirement. See *id.* at 794 n.46 (citing *People v. Sharpe*, 839 N.E.2d 492, 500 (Ill. 2005)).

64. See HOWARD, *supra* note 53, at 284-94; see also William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 367 (1997); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1321 (2003). On the contemporary significance of open courts provisions, see Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism*, 56 ST. LOUIS U. L.J. 917, 999-1034 apps. 1 & 2 (2012).

65. HOWARD, *supra* note 53, at 454 (reproducing the VA. DECLARATION OF RIGHTS § 15 (1776)); *id.* at 459 (reproducing the MASS. DECLARATION OF RIGHTS, art. XVIII (1780)).

66. See Law, *supra* note 1, at 687-93; see also Alice Ristrop, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 284-91 (2005).

67. See Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS: NOMOS XVIII 3, 4, 38 (J. Roland Pennock & John W. Chapman eds., 1977) (arguing that the “idea of due process that lasts” is “of individual freedom from arbitrary government imposition”; tracing this idea from Magna Carta through colonial and contemporary history; and concluding that the “durability of due process over seven and half centuries . . . is a tribute to law-minded people whose . . . aspirations for a just life are . . . finely attuned to the relation between individual fulfillment and social welfare”).

limited government can be realized.<sup>68</sup> Second, constitutional democracies' legitimacy is based on accountability to the people, including but not limited to majoritarian consent. Elections provide one source of accountability, but ensuring that government has justified reasons for action (whether legislative or executive) helps promote accountability on an ongoing basis.<sup>69</sup> Third, constitutional democracies are not only limited governments; they are governments limited by a commitment to fundamental human equality. It is on that commitment to the normative equality of all members of the polity that democratic self-governance rests.<sup>70</sup> Recognizing each person as endowed with a quality of humanity equally deserving of respect arguably calls for reasoned justification for the imposition of special burdens or intrusions.<sup>71</sup>

Recognizing proportionality as a goal of constitutional government does not necessarily imply that judicial review is the best method for achieving proportionate decision making. For example, *McCulloch v. Maryland* concluded that the principal protection against abusive taxation is the link between representation and the taxed constituency.<sup>72</sup> Legislators and executive actors may be understood ordinarily to have obligations to act proportionately, even if those obligations are not justiciable. What, then, is the role of judges in implement-

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68. Cf. SULLIVAN & FRASE, *supra* note 52, at 169, 175 (arguing that proportionality is an “instrumental method of reviewing excessive government measures” and recommending its use across constitutional law as a “general standard of review”); Ristrop, *supra* note 66, at 265 (conceptualizing proportionality “as a limitation of state power in a constitutional liberal democracy”).
69. Cf. BARAK, *supra* note 22, at 472-73 (arguing that limitations on rights must be properly justified to be compatible with democracy and that proportionality analysis is a “meaningful” way of doing so).
70. See, e.g., Louis Henkin, *Human Dignity and Constitutional Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210, 214-15 (Michael J. Meyer & William A. Parent eds., 1992); Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM FOR SPIROS SIMITIS 249, 250-52, 270 (Dieter Simon & Manfred Weiss eds., 2000).
71. Cf. Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 1018-19 (2006) (arguing that the “values that underlie” the right to equal democratic participation, including “the ideal of a political community of equals” in which each person deserves “similar respect,” support a right to judicial review); Walter F. Murphy, *Consent and Constitutional Change*, in HUMAN RIGHTS AND CONSTITUTIONAL LAW 123 (James O'Reilly ed., 1992) (arguing that the moral autonomy of persons that underlies the legitimating force of consent also implies limits on what democratic majorities may do). For an argument that human rights are grounded in a moral right of justification, that is, to explain why “human beings [are only] . . . treated in a way that could . . . be justified to him or her as a person equal to others,” see Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 120 ETHICS 711 (2010).
72. 17 U.S. (4 Wheat.) 316, 430 (1819); see also *United States v. Cnty. of Fresno*, 429 U.S. 452, 458-59 (1977) (“A State’s constituents can be relied on to vote out of office any legislature that imposes an abusively high tax on them.”).

ing the constitutional value of proportionality? I consider this question first outside the United States and then within it.

### C. Proportionality Elsewhere: The United States in Comparative Perspective

Having suggested that the principle of proportionality is part of the U.S. Constitution, I turn now to proportionality as a structured doctrine developed in the post-World War II period in Germany, Canada, Israel, and elsewhere.<sup>73</sup> Although there are differences in doctrinal terms and applications among different courts,<sup>74</sup> for purposes of comparison to U.S. approaches, I focus primarily on Canada,<sup>75</sup> drawing from other jurisdictions to illustrate particular points.

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73. The origin of “proportionality doctrine” is often attributed to German administrative and police law of the nineteenth century. See, e.g., COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 24–32. Whether German law inspired Canadian law in this instance is uncertain. See ROBERT J. SHARPE & KENT ROACH, BRIAN DICKSON: A JUDGE’S JOURNEY 334 (2003) (suggesting that the *Oakes* test may have come from case law of the European Court of Human Rights); Grimm, *supra* note 2, at 383–84 (raising the possibility that the *Oakes* test was derived from *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980), but alternatively suggesting that it could have come from Germany); Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 620 n.134 (2010) (noting the strong similarities between the German and Canadian tests and the possibility that *Oakes* may have been inspired by German constitutional law, through Justice Dickson’s law clerk, Joel Bakan, who had recently studied European human rights law).

74. See *infra* note 84; *supra* notes 23, 28.

75. Canada is an especially apt point of comparison. Canada has long had judicial review of constitutional constraints on government. Its 1867 Constitution Act allocated powers to the central and provincial governments, and conferred a limited number of rights to protect minority religions and languages. See Constitution Act, 1867, 30 & 31 Vict., c.3, §§ 91–93, 133 (U.K.), reprinted in R.S.C. 1985, app. III, no. 5 (Can.). The Supreme Court of Canada was established in 1875, and, acknowledging the influence of U.S. cases, began resolving constitutional controversies soon thereafter. Canada’s early constitutional cases focused primarily on the division of powers between the provincial and federal governments. See, e.g., *Citizens & Queen Ins. Co v. Parsons*, [1880] 4 S.C.R. 215, 277–82 (Fournier, J.), 287–88 (Henry, J.), 298–301, 304–06 (Taschereau, J.) (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869)); *Severn v. The Queen*, [1878] 2 S.C.R. 70, 120–29 (Fournier, J.) (discussing *Brown v. Maryland*, 25 U.S. 419 (1827)). Moreover, even before the adoption of its statutory Bill of Rights in 1960, or its constitutional Charter of Rights and Freedoms in 1982, the Canadian Court limited government through statutory interpretation in light of unwritten constitutional principles. See, e.g., John Willis, *Administrative Law and the British North America Act*, 53 HARV. L. REV. 251, 275 (1939) (noting the “spurious interpretation” of statutes to protect due process rights, despite the lack of a constitutional basis); see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 142 (Rand, J.) (finding that a duty of good faith, implicit in the rule of law, binds public officials). And, like in the United States (and unlike in Germany), in Canada, judicial review of constitutional issues is “decentralized”—that is, it is not limited to a single specialized constitutional court, so that many courts in the country can address constitutional claims.

In 1982, after a long public process, Canada adopted as part of its constitution the Charter of Rights and Freedoms, which in Section One guaranteed the rights set forth therein “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>76</sup> This provision may be referred to as a “limitations” clause because it recognizes that rights may be limited by strong enough reasons, or as a “savings” clause, because statutes otherwise infringing on rights may be preserved from invalidation by meeting the standards of Section One. Canadian doctrine has developed a proportionality test to determine whether this standard is met.<sup>77</sup> Limitations clauses in other countries have also been understood to invite courts to review the justifications for government action through proportionality analysis.<sup>78</sup>

In Canada, when government action is challenged as violating a Charter right, the challenger bears the burden of showing a rights infringement, and Canadian judges first inquire into the scope of the interests that the right protects. In so doing, the court typically adopts a generous view of the scope of what is protected by the right.<sup>79</sup> The court then considers whether the gov-

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76. Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being Schedule B to the Canada Act, 1982*, c. 11 (U.K.).

77. See *supra* note 24 and accompanying text. Similar tests are used in Germany, Israel, and other jurisdictions; the similarity of these approaches is a testament to the global spread of proportionality analyses in constitutional law. See *supra* note 73. See generally Stone Sweet & Mathews, *supra* note 37. On why surface similarities may contain important differences, see BOMHOFF, *supra* note 2 (comparing “balancing” analyses in the United States and Germany).

78. See, e.g., Basic Law: Human Dignity and Liberty, 5752-1992, SH no. 1391 p. 150, § 8 (Isr.) (“There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”); S. AFR. CONST., 1996, § 36(1) (“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 . . .”). Rights may also have “internal” limitations embracing principles of proportionality, as in Canada’s “qualified rights.” See 2 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA ch. 38-14 (5th ed. supp. 2007). Such rights include the protections against “unreasonable” search or seizure, “arbitrary” detention, and “cruel and unusual treatment or punishment,” each of which is discussed below. See *infra* notes 189-201, 430-431.

79. See Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,”* Rights and Federalism, 1 U. PA. J. CONST. L. 583, 606 (1999) (noting the tendency in Canada to interpret the scope of the right broadly and to decide cases under the justificatory stage of analysis); see also Peter W. Hogg, *Interpreting the Charter of Rights: Generosity and Justification*, 28 OSGOODE HALL L.J. 817, 819-20 (1990) (identifying and critiquing this approach). This difference between the U.S. and Canadian approaches can be illustrated by comparing free speech cases: the Canadian courts interpret “freedom of expression” to include any activity, except for physical violence, that “conveys or attempts to

ernment has shown that it is acting under clear legal authority<sup>80</sup> and for reasons that are “pressing and substantial in a free and democratic society”;<sup>81</sup> if not, inquiry is at an end.<sup>82</sup> If the infringement of right is pursuant to govern-

convey a meaning,” *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, 968, 969 (Can.), and do not carve out categories of generally unprotected speech, as does U.S. case law. Compare, e.g., *Reference re §§ 193 & 195.1(1)(c)* of Criminal Code (the *Prostitution Reference Case*), [1990] 1 S.C.R. 1123, 1125 (Can.) (holding that solicitation of prostitution is within the scope of freedom of expression protected under Charter § 2(b), but that the legislative infringement on speech rights was justified under § 1), *with United States v. Stevens*, 559 U.S. 460, 469-70 (2010) (discussing “historically unprotected categories” of speech), *and Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973) (“We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”). More recently, the Canadian Supreme Court found that certain restrictions on prostitution were violations of Charter § 7’s protection of “security of the person” that were *not* saved by § 1, because insofar as they prevented prostitutes from screening prospective clients to protect their own safety, prohibiting communication with respect to prostitution was “grossly disproportionate” to the valid objective of the law. *Canada v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, ¶¶ 22-23, 69-72, 108-09, 120-22, 133-34, 159, 161-63 (Can.).

80. A rights limitation can only be justified if it is “prescribed by law.” Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). See *Greater Vancouver Trans. Auth. v. Can. Fed’n of Students*, 2009 SCC 31, [2009] 2 S.C.R. 295, ¶¶ 70-73 (Can.) (holding that a policy restricting advertising on the side of public buses was “prescribed by law” since it was binding, properly enacted, precise, and publicly accessible); *Little Sisters Book & Art Emporium v. Canada*, 2000 SCC 69, [2000] 2 S.C.R. 1120, ¶¶ 85, 141 (Can.) (finding that customs officials’ discriminatory treatment of gay and lesbian materials could not be justified since the discrimination arose from internal administrative decisions and was not “prescribed by law”). Rights limitations under the authority of an excessively vague law will not constitute a limit “prescribed by law”: “where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no ‘limit prescribed by law.’” *Irwin Toy*, [1989] 1 S.C.R. at 983.
81. *R. v. Oakes*, [1986] 1 S.C.R. 103, 138-39 (Can.) (explaining that to justify rights infringements under § 1, the law’s objective must be “pressing and substantial,” or “of sufficient importance to warrant overriding a constitutionally protected right or freedom”). In practice, the Court has rejected the sufficiency of government objectives only where the objective was found to be either illegitimate or nonexistent. See *infra* note 82. The distinctive Canadian formulation is often compared to the German test, which requires simply a “legitimate purpose.” See, e.g., David Bilchitz, *Socio-Economic Rights, Economic Crisis, and Legal Doctrine*, 14 INT’L J. CONST. L. 710, 735 (2014).
82. See, e.g., *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶¶ 113-15 (Can.) (invalidating the omission of sexual orientation as a protected ground in a human rights code, finding the government had no articulated objective served by the omission); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.) (invalidating a statute requiring most stores to close on Sunday because its purpose—to try to force religious observance—was illegitimate). For a lower court decision, later overruled, that a statute lacked the “pressing and substantial purpose” required under the *Oakes* test, see *Canada (A.G.) v. Somerville*, [1996] 184 A.R. 241 (Can. Alb. C.A.), which found that provisions in the Canada Elections Act imposing advertising blackouts and limiting third party election expenditures had an improper purpose of enhancing the

ment action authorized by law and has a “pressing and substantial” purpose, the Court then considers whether the government has shown that the challenged action is “demonstrably justified.”<sup>83</sup>

At this justificatory stage, the courts employ a three-part inquiry, focusing on the *means* used to advance the government’s purpose and asking whether (1) the means chosen are rationally related to the legitimate object; (2) the means chosen “minimally impair” protected rights; and (3) the benefits towards achieving the government’s objective are sufficient to warrant the harm to interests protected by rights (a step called “proportionality as such”).<sup>84</sup> The rationality step is similar to U.S. rational basis review.<sup>85</sup> Although this element

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position of political parties and their candidates and hence violated the Charter. The Alberta court’s reasoning on this point was, however, rejected in *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, ¶¶ 55–56, 79.

83. Canadian jurists emphasize the connection between the protection of rights and the kinds of justifications that can support their limitation. *See, e.g., Oakes*, [1986] 1 S.C.R. at 135; cf. Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993) (arguing that rights and consequentialist concerns justifying limiting rights are conceptually interdependent).
84. *See, e.g., Oakes*, [1986] 1 S.C.R. at 139 (deciding that there are “three important components of a proportionality test”):

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.

. . . Second, the means . . . should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the *effects* of the measure . . . and the objective which has been identified as of “sufficient importance.”

*Id.* (citation omitted). The language used to describe this test is articulated and applied somewhat differently across jurisdictions. *See, e.g., HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel*, 58(5) PD 807 [2004] (Isr.), translated in 2004 ISR. L. REP. 264, 297 (referring to “the ‘proportionate measure’ test (or proportionality ‘in the narrow sense’”); BARAK, *supra* note 22, at 340 (describing the third test as one of “proportionality *stricto sensu*,” requiring “a proper relation (‘proportional’ in the narrow sense of the term) between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose”); *id.* at 350–65 (distinguishing his approach to this final test, which analyzes the marginal importance of the purpose and of the rights limitation in light of other alternatives, from that of German theorist Robert Alexy); MÖLLER, *supra* note 29, at 193–99 (equating “rationality” with “suitability”; “necessity” with “less restrictive but equally effective”; and proportionality “in a narrow sense” with “balancing”); Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 582 (2003) (describing the German proportionality test requiring that “(1) the act must be appropriate (*geeignet*) . . . ; (2) the act must be necessary (*erforderlich, notwendig*), which would not be the case if the ends could be achieved with less restrictive or burdensome means; and (3) the act must be proportionate strictly speaking (*verhältnismässig*), which means that its costs must remain less than the benefits secured by its ends”).

85. *See Mathews & Stone Sweet, supra* note 52, at 802 (calling the rationality step “broadly akin to what Americans call ‘rational basis’ review,” but noting that “under [proportionality

is normally found to be satisfied, in *Oakes* the Canadian Supreme Court concluded that a rebuttable presumption that one who possessed any amount of a drug was also trafficking in the drug was not rational.<sup>86</sup>

If the statute is found (as most are) to be a “rational” means of advancing the government’s purpose, the courts go on to consider whether it impairs the right “as little as reasonably possible in order to achieve the legislative objective.”<sup>87</sup> This *minimal impairment* step has sometimes been described as a cognate test to the U.S. “least restrictive alternative” requirement in strict scrutiny; this second step is sometimes described in scholarly literature as a “necessity” test.<sup>88</sup> However, the minimal impairment test does *not* necessarily imply that if any less restrictive approach can be imagined, the law is invalid;<sup>89</sup> the government “is not required to pursue the least drastic means of achieving its objective,” so long as it “adopt[s] a measure that falls within a range of reasonable alternatives.”<sup>90</sup> The Canadian courts will look to see whether there is an obvious and workable alternative, sometimes drawing on approaches already in use by governments, as in a recent case involving procedures for secret evidence in immigration proceedings.<sup>91</sup> Chief Justice McLachlin has emphasized that the

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analysis], the appraisal of government motives and choice of means is more searching”). For discussion of the rationality (“rational connection,” “appropriateness,” or “suitability”) step by a former President of Israel’s Supreme Court, see BARAK, *supra* note 22, at 303-16.

86. *Oakes*, [1986] 1 S.C.R. at 142. Cf. Mounted Police Ass’n of Ont. v. Canada (A.G.), 2015 SCC 1, ¶¶ 145-53 (Can.) (McLachlin, C.J. & LeBel, J.) (finding ban on police having labor union was not rationally connected to the goal of promoting a “stable, reliable and neutral police force,” but going on also to find that the statute failed the “minimal impairment” test).
87. *RJR-MacDonald Inc. v. Canada* (A.G.), [1995] 3 S.C.R. 199, 342-43 (Can.) (McLachlin, J.) (emphasizing also that “the law must be carefully tailored so that rights are impaired no more than necessary,” acknowledging that “a range of reasonable alternatives” may exist, but indicating that “if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail”).
88. Stone Sweet & Mathews, *supra* note 37, at 75, 78-79 (describing, generically, the steps of proportionality analysis).
89. *RJR-MacDonald*, [1995] 3 S.C.R. at 342-43.
90. *Mounted Police Ass’n of Ont.*, 2015 SCC ¶ 149.
91. See, e.g., Charkaoui v. Canada, 2007 SCC 9, [2007] 1 S.C.R. 350, ¶¶ 85-87 (Can.) (finding procedures for the judge’s considering secret evidence with no access to the respondent or one acting for him failed the minimal impairment test, given the availability of alternatives such as security-cleared special advocates in use under other regimes in Canada and in the U.K.). Other formulations are sometimes given. In *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61, ¶ 439 (Can.) (citations omitted), Chief Justice McLachlin, writing for only herself, stated that in applying the minimal impairment step the courts recognize the government’s “margin of appreciation in selecting the means to achieve its objective” and focus on whether the challenged measures “fall within a range of reasonable alternatives,” especially “where the impugned measures ‘attempt to strike a balance between the claims of legitimate but competing social values.’” See also *R. v. Keegstra*, [1990] 3 S.C.R. 697, 784-85 (Can.) (arguing that minimal impairment does not require laws to be

“important point” is whether proposed alternative (and less rights-impairing) means would be “less effective” in advancing the government’s goal.<sup>92</sup>

In cases involving more polycentric interests, “minimal impairment” scrutiny can allow considerable latitude to legislative choices. In *Edwards Books*,<sup>93</sup> the Canadian Supreme Court upheld an Ontario statute establishing Sunday as a common day of recreation in which most retail businesses had to close. The statute had an exception for employers who closed for Sabbath on Saturday and had fewer than seven employees working on Sunday,<sup>94</sup> but several Ontario retailers, including some owned by observant Jews, challenged the statute. They argued that the different approach taken in New Brunswick was less impairing of religious freedom rights; New Brunswick provided an exemption for *any* retailer with a sincere religious belief that it needed to close on a day other than Sunday.<sup>95</sup> The Court was not persuaded that New Brunswick’s approach

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the “least intrusive” and stating that in light of different options and objectives “the government may legitimately employ a more restrictive measure . . . if that measure . . . further[s] the objective in ways that alternative responses could not,” provided it is otherwise proportionate to a valid objective). Canadian scholars are divided on whether relaxation of the minimal impairment rest “is a good or a bad thing.” Jackson, *supra* note 79, at 608.

92. *Quebec (Att'y Gen.) v. A.*, [2013] 1 S.C.R. ¶ 442; see *supra* note 87. *Quebec (Attorney General) v. A.* involved a Charter challenge to Quebec’s failure to treat de facto marriages as carrying the full range of property rights and support on termination as did formalized marriages or civil unions. Four justices found no violation of Charter equality rights; five justices found a violation of Section 15 equality rights. However, Chief Justice McLachlin (one of the five) concluded that the statute could nonetheless be salvaged under Section 1. For Chief Justice McLachlin, the goal of the Quebec scheme was “choice and autonomy for all Quebec spouses . . . to structure their relationship outside . . . the mandatory regime applicable to married and civil union spouses,” [2013] 1 S.C.R. ¶ 435 (McLachlin, C.J.), supported by considerations of federalism, *id.* ¶¶ 439-49; see *id.* ¶ 447 (describing Quebec as seeking to “maximiz[e] autonomy and choice”). Three other justices who found a Section 15 violation would have upheld all but the support provisions under Section 1. Justice Abella, who alone found none of the equality violations to be justified under Section 1, disagreed with the Chief Justice as to minimal impairment and proportionality as such, *see id.* ¶¶ 358-80 (Abella, J., dissenting) (arguing that an “opt out” approach, with presumptive application of the same rules to de facto as to formal marriage, was less impairing because it would better protect the economically vulnerable partner and would equally advance the purpose). Their disagreement may illustrate the significance of how the government’s purpose is articulated. For Justice Abella, the goal was simply “freedom of choice,” *id.* ¶ 358, a goal that could be served as well, with less harm to the economically weaker partner, by the opt-out approach, *id.* ¶¶ 377-79. On the risks of accepting “maximization” as part of a government goal, see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, ¶¶ 147, 149 (Abella, J., dissenting); and *id.* ¶ 195 (LeBel, J., dissenting). These disagreements might be understood as about defining the government purpose, or as about what a “reasonable alternative” is for minimal impairment purposes.

93. R. v. Edward Books & Art Ltd., [1986] 2 S.C.R. 713 (Can.).

94. *Id.* at 727.

95. *Id.* at 773.

was less impairing: New Brunswick made the exemption available regardless of the number of employees, but Ontario did not require the employer to claim a sincere religious belief. So a small shopkeeper employing observant Jews could benefit from the exemption regardless of the employer's beliefs.<sup>96</sup> Likewise, the Court found, another proposed alternative—allowing an exemption to be invoked by individual employees—was not necessarily more minimally impairing, because of subtle social pressures on employees not to assert such claims.<sup>97</sup> Given the complexity of the rights-holders' interests—as owners, employees, and consumers—the Court could not conclude that one approach was less impairing of rights than another; the infringement on religious freedoms was found not disproportionate to the legislature's objective; and so Ontario's law stood.<sup>98</sup>

The last stage of analysis is sometimes called “proportionality as such.”<sup>99</sup> In this phase, the court asks whether the government's reasons for regulating and the degree to which they are likely to be served can justify the harm to constitutionally protected interests. By going beyond rationality and minimal impairment, the “proportionality as such” test can make the doctrine more rigorous than U.S. strict scrutiny, which ends after the “least restrictive means” test. In *Oakes*, Chief Justice Dickson explained that:

Some limits on [Charter] rights and freedoms . . . will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. *The more severe the deleterious effects of a*

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96. *Id.* at 774.

97. *Id.* at 773 (deciding that “[a] scheme which requires an employee to assert his or her rights before a tribunal in order to obtain a Sunday holiday is an inadequate substitute for the regime selected by the Ontario legislature”).

98. *Id.* at 779. The Court added: “[T]he courts must be cautious to ensure that [the Charter] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.” *Id.*

99. This step is also referred to as “proportionality in the narrow sense” or proportionality “*stricto sensu*.” See Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS. 131, 135 (2003); Stone Sweet & Mathews, *supra* note 37, at 75; *see also supra* note 84.

*measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*<sup>100</sup>

Minimal impairment analysis is defined by the scope of the government's objective; only proportionality as such "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups.'"<sup>101</sup>

Canadian cases rarely turn on this third step, generally finding laws unconstitutional on minimal impairment grounds.<sup>102</sup> Other jurisdictions, however, sometimes find that a statute that passes minimal impairment nonetheless fails "proportionality as such." In Germany, for example, "proportionality as such" has been used more often than in Canada.<sup>103</sup>

While "proportionality review" requires an initial determination of whether the government's purpose is sufficiently important to warrant restricting rights at all, in the final stage the *relative strength* of that interest is evaluated in relation to the specific harm to rights;<sup>104</sup> the greater the intrusion on rights, the

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<sup>100</sup>. R. v. Oakes, [1986] 1 S.C.R. 103, 139-40 (Can.) (emphasis added).

<sup>101</sup>. Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, ¶ 76 (Can.) (McLachlin, C.J.). Chief Justice McLachlin goes on to quote Aharon Barak's argument: "Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right." *Id.* ¶ 76 (quoting Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 374 (2007)).

<sup>102</sup>. See *id.* ¶¶ 75-78 (acknowledging that proportionality as such has not had a strong independent role in Canadian jurisprudence to that point, but suggesting that this should change going forward). Chief Justice McLachlin explained:

Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. 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*.

*Id.* ¶ 76.

<sup>103</sup>. Grimm, *supra* note 2, at 393-94 (arguing, before *Hutterian Brethren*, that Canadian courts tend to subsume proportionality as such into earlier steps of proportionality analysis). In response to German scholar Bernard Schlink's argument that there should not be proportionality as such in review of legislation, but that analysis should stop with minimal impairment, Grimm has argued that one must be able to assess the third stage in order to have a basis for invalidating, for example, a statute providing an authorization for property owners to kill another person, if there is no other way to protect their property. *Id.* at 395-96.

<sup>104</sup>. See, e.g., Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1, 7 (2010).

greater must be the need and justification for the challenged measure. Consider an example from Israel, whose case law sometimes adopts a particularly rigorous form of analysis of this last prong. In the *Beit Sourik* case,<sup>105</sup> the Israeli High Court of Justice found that the government had a legitimate purpose in building a fence to protect Israelis from violent attacks from occupied territory.<sup>106</sup> The Court found that the government's choice for the fence location, near the top of a mountain, was a *rational* step towards the goals of surveillance and protecting security forces and travelers on a nearby highway.<sup>107</sup> The line drawn was also *minimally impairing* of the rights of Palestinians fenced off from their lands because no other route could achieve an equivalent level of security.<sup>108</sup> The court explained that a "less restrictive means" referred only to an alternative that equally advances the law's purpose while intruding less on rights.<sup>109</sup> However, the Court held, the fence had to be moved to a less elevated location, allowing Palestinians more access to their lands, because the initial location failed the final, "proportionality as such" test: the marginal improvement to security—and protection of the life of the Israeli civilian—from the line that the military chose, as compared to a line in a lower location, was, in the Court's view, far less than the marginally greater intrusions on Palestinian humanitarian rights.<sup>110</sup>

Not surprisingly, the U.S. case law on "less restrictive means" sometimes obscures the distinction between "less restrictive means" that are as effective and those that are not, in part because of the absence of any separate analysis of "proportionality as such." Differing formulations can elide whether a "less restrictive means" must be one that achieves equivalent progress towards the government's legitimate goal.<sup>111</sup> Indeed, U.S. courts referring to "least restric-

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<sup>105.</sup> HCJ 2056/04 *Beit Sourik Vill. Council v. Gov't of Israel*, 58(5) PD 807 [2004] (Isr.), *translated in 2004 ISR. L. REP.* 264.

<sup>106.</sup> For a critique of the court for accepting that this was the only purpose, see Moshe Cohen-Eliya, *The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 262 (2005).

<sup>107.</sup> *Beit Sourik*, 2004 ISR. L. REP. at 308.

<sup>108.</sup> *Id.* at 308-10.

<sup>109.</sup> *Id.* (noting that, in the less restrictive (or "less harm[ful]") means inquiry, "[t]he question . . . is whether this [alternative] route satisfies the security objective underlying the separation fence to the same extent as the route determined by the military commander"); *see also* BARAK, *supra* note 22, at 323.

<sup>110.</sup> *Beit Sourik*, 2004 ISR. L. REP. at 310-14.

<sup>111.</sup> At times, the Justices discuss "less restrictive means" in terms focusing on whether the alternatives are equally effective (as the Israeli Court did in *Beit Sourik*); at other times, U.S. Justices place emphasis instead on the lesser degree to which another alternative would intrude on rights. See *infra* note 113; Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003); *see also* Noah Marks, Case Comment, "*Least Restrictive Means*": *Burwell v. Hobby Lobby*, 9 HARV. L. & POL'Y REV. S15 (2015). Compare, e.g., *District of Columbia v. Heller*,

tive alternatives” tend not to specify whether this analysis requires that the measures being compared “equally advance” the compelling government interest. In *United States v. Alvarez* (the Stolen Valor Act case), the plurality accepted that an online database against which false claims could be checked was less restrictive than a criminal prohibition on lying about receiving the Medal of Honor.<sup>112</sup> The analysis left unclear whether the plurality had concluded that a database would be *equally effective* in carrying out the government’s legitimately relevant interests, or instead that even if the database were less effective, the database would be a sufficient alternative given the relatively greater importance of free speech concerns.<sup>113</sup> Similarly, in *McCullen v. Coakley*,<sup>114</sup> the U.S. Court, in concluding that a thirty-five-foot buffer zone was not sufficiently tailored to achieve the government’s legitimate goal of maintaining public safety and preserving access to abortion clinics, left unclear whether there were equally effective alternatives or whether the marginal additional benefit towards the government’s goal under the statute, as compared to alternatives, was unjustified in light of the degree of intrusion on rights.<sup>115</sup> By contrast, the relative importance of the rights and values at stake can be distinctly evaluated in structured proportionality analysis at the “proportionality as such” stage.

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554 U.S. 570, 712 (2008) (Breyer, J., dissenting) (“[A]lthough there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban . . .”), and *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (stating that a “less restrictive alternative[]” must be “at least as effective in achieving the legitimate purpose that the statute was enacted to serve”), *with United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”), and *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115, 128-30 (1989) (finding that less restrictive alternatives to a complete ban on indecent telephone communications existed, even though they might not prevent all minors from accessing such communications).

112. See *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012).

113. See *id.* (rejecting the government’s argument that a database would be “impracticable and insufficiently comprehensive,” as lacking adequate explanation). Laurence Tribe has recognized that sometimes a finding that there is a less restrictive alternative represents a hidden weighing of the relative proportionality of the two approaches. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 722-23 (1978) (“Implicit in any such holding . . . is a judgment that the reduced effectiveness entailed by a less restrictive alternative is outweighed by the increment in . . . protection gained by demanding such an alternative.”); cf. Sykes, *supra* note 111, at 415-16 (arguing that in WTO adjudication, the less restrictive means test operates as a crude form of cost-benefit balancing). Some Canadian cases, perhaps reflecting reluctance to rely on “proportionality as such” as a basis for invalidating a statute, may similarly combine concerns of proportionality with analysis of minimal impairment, *see Grimm*, *supra* note 2, at 394-95, though the Court has recently called for more clarity as between the two, *see supra* notes 102 & 103.

114. 134 S. Ct. 2518 (2014).

115. See, e.g., *id.* at 2540 (“[T]he government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests . . .”).

A striking feature of Canadian jurisprudence has been the stability of the proportionality doctrine and its utility as a method for a structured decisional analysis in which the Justices generally focus on the same questions in the same order.<sup>116</sup> (As we shall see, Canadian concerns for proportionality are found not only in formal Section 1 analyses but also in definitions of the scope of certain rights.<sup>117</sup>) Although the three doctrinal components of proportionality review of means are similarly framed in most jurisdictions that use the doctrine, these elements may be applied somewhat differently by different courts or judges.<sup>118</sup>

<sup>116.</sup> This is so even where the Canadian Court is sharply divided. See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697, 734-38, 744-89, 790-96 (Can.) (Dickson, C.J.); *id.* at 844-67 (McLachlin, J., dissenting); *Quebec (Att'y Gen.) v. A.*, [2013] 1 S.C.R. 61, ¶¶ 432-49 (Can.) (McLachlin, C.J.); *id.* ¶ 358-80 (Abella, J., dissenting in result). To be sure, there have been divergences in the rigor with which the categories of analysis are applied, and the development of more and less deferential approaches to application of the elements of the proportionality test. See Sujit Choudhry, *So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1*, 34 SUP. CT. L. REV. (2d) 501 (2006). Choudhry argues that *Oakes* “created an enormous institutional dilemma for the Court, by setting up a conflict between the demand for definitive proof to support each stage of the section 1 analysis, and the reality of policy making under conditions of factual uncertainty,” leading to the development of different standards of deference in areas of factual uncertainty, applied inconsistently. *Id.* at 503. Even if Choudhry’s analysis is correct, the *Oakes* test has still considerably narrowed and structured the Canadian Court’s analysis of Charter problems.

There are, however, a few cases where the Canadian Court has split on the question of whether *Oakes* should apply at all; in these cases, different frameworks are applied by different justices in the same case. Compare, e.g., *Multani v. Comm'n Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (applying Section 1 analysis, rather than administrative review principles), with *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 (rejecting Section 1 *Oakes* analysis for review of challenged administrative action). Under *Doré*, reviewing courts are to ask whether the administrative “decision reflects a proportionate balancing of the *Charter* protections at play.” *Id.* ¶ 57. The inquiry in reviewing specific administrative action is thus itself designed to reflect the Charter values of Section 1: the administrative decision maker is to “ask how the Charter value at issue will best be protected in view of the statutory objectives . . . , [an inquiry] at the core of the proportionality exercise, [which] requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.” *Id.* ¶ 56. More flexible “Charter values” analyses, rather than the formal *Oakes* inquiry, occur in other areas as well. See, e.g., *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (holding that the Charter does not apply directly to the common law governing private disputes, but that Charter values should inform the balancing process inherent in the development of private common law); cf. *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725 (adopting a common law approach to defining Charter Section 9 limits on non-statutory detention powers, implying that this approach sufficiently takes account of Charter values, over a concurrence arguing for full Section 1 *Oakes* analysis).

<sup>117.</sup> See *supra* note 116 (describing *Clayton*); *infra* notes 194-195, 198, 201.

<sup>118.</sup> See, e.g., VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 57-62 (2010) (noting the “margin of appreciation” doctrine of the European Court of Human Rights, which gives states room to maneuver in their adherence to the European Convention, and variations in application of proportionality doctrine); Grimm, *supra* note 2, at 389-

Nonetheless, proportionality doctrine has shown itself capable of providing a stable framework across many controversial issues, in jurisdictions widely recognized as free and democratic constitutional states.

## II. OF OLDER TEXTS, CLAUSE-BOUND INTERPRETATION, AND NEGATIVE PRECEDENTS

Despite proportionality's appeal in other countries and its partial presence in some areas of U.S. constitutional law,<sup>119</sup> the Supreme Court treats proportionality in different constitutional arenas as unconnected. Multiple accounts of the relative absence of proportionality from U.S. constitutional law have been offered.<sup>120</sup> As later Parts will argue, this relative absence does not mean that the current situation must remain as it is, nor are the historic reasons for its relative absence reasons against expanding its use today.<sup>121</sup> In this Part, I try to account for why proportionality as a general principle or doctrine has not emerged in the United States.

There are many factors contributing to the relative dearth of proportionality analysis in U.S. jurisprudence, among them a general propensity for what John Hart Ely critically referred to as “clause-bound” interpretation.<sup>122</sup> Unlike

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95 (exploring why Canadian cases are less likely than German cases to rest on “proportionality as such”); Petersen, *supra* note 23, at 2 (noting that the South African Constitutional Court treats the different elements, not as a logically sequenced set of questions as in Canada or Germany, but rather as “part of the overall balancing exercise”); *see also supra* note 84. Likewise, there is considerable debate even among scholars from jurisdictions that invoke proportionality as to its merits. See *infra* Part IV.A; Jackson, *supra* note 79, at 608-09 (noting an early debate among Canadian scholars about the Court’s development of the *Oakes* test).

119. See Mathews & Stone Sweet, *supra* note 52, at 800 (“American judges chose proportionality in the past and introduced it into our doctrinal DNA.”); *see also supra* text accompanying notes 43-52.

120. For two recent accounts comparing U.S. and German development, see BOMHOFF, *supra* note 2; and COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3. Bomhoff is careful to note that his study of German legal culture is focused on balancing in earlier periods, while also noting balancing’s connection to proportionality analysis and the arguments of Robert Alexy.

121. Cf. Fallon, *supra* note 6, at 1285 (arguing that “strict scrutiny” doctrine “is not a timeless feature of constitutional law, but rather a judicially developed device of relatively recent origin that even now could be abandoned by the Supreme Court at any time”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1227-28, 1280 (1999) (discussing the possibility of comparison in illuminating falsely felt senses of necessity, while noting the difficulty of distinguishing true from false necessities).

122. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12 (1980); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 29 (1998); BOMHOFF, *supra* note 2, at 196.

some European courts, U.S. constitutional case law has for the most part not aspired to general theoretical connections linking constitutional doctrines in one area to those in another.<sup>123</sup> Moreover, from a comparative perspective, scholars have observed that balancing or proportionality in Germany is associated with rights protection in a frame of constitutional perfectionism, while in the United States balancing is associated with pragmatic ad hocery and limitations on rights.<sup>124</sup>

Several additional reasons relating to the age of the U.S. Constitution also help account for why proportionality has not emerged as an articulated general constitutional principle or doctrine. The Constitution's age affects both the timing of case law development and the contents of constitutional text. Unlike the Canadian Charter of Rights (1982) or the German Basic Law (1949), many of the Constitution's rights provisions date to the late eighteenth and mid-nineteenth centuries. They regularly became the subject of the Court's interpretation in the late nineteenth and early twentieth centuries. An evolving body of U.S. case law had already developed well before the atrocities of World War II and the subsequent explosion of international human rights law. By contrast, in Germany (after 1949) and Canada (after 1982), the highest courts were faced with new rights-protecting instruments, framed by international commitments to human rights, which provided an occasion for affording some degree of coherent interpretation to new constitutional instruments.<sup>125</sup> The U.S. Constitution, moreover, has no general limitations clause, unlike many modern constitutions.<sup>126</sup> Such limitations clauses can provide a textual basis for a gen-

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<sup>123.</sup> See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) ("Textual argument as typically practiced today is blinkered ('clause-bound' in Ely's terminology), focusing intently on the words of a given constitutional provision in splendid isolation." (quoting ELY, *supra* note 122, at 12)).

<sup>124.</sup> See BOMHOFF, *supra* note 2, at 191-203; COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 42-43; see also text accompanying *infra* notes 139-161.

<sup>125.</sup> See, e.g., Lorraine Weinrib, *Canada's Charter: Rights Protection in the Cultural Mosaic*, 4 CARDozo J. INT'L & COMP. L. 395, 403-10 (1996) (emphasizing the purposive, coherent initial interpretation of the *Charter*); BOMHOFF, *supra* note 2, at 105-12 (emphasizing the harmonic goals of German Basic Law interpretation).

<sup>126.</sup> See generally Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 204-05, 227-37 (2008) (arguing that the limitations clauses of modern constitutions invite the balancing of rights and other interests in ways that detract from the special significance of having a right). On the influence of the limitations clause in the Universal Declaration of Human Rights (to which an American Law Institute committee may have contributed) on new constitutions in the post-World War II period, see JACKSON, *supra* note 118, at 86-87.

eral doctrine of how to justify the infringement of rights, though they are not necessarily the foundation for courts doing so.<sup>127</sup>

As an older constitution, moreover, the U.S. Constitution (as conventionally understood) contains fewer rights and thus gives rise to fewer occasions for conflicts between constitutional principles than many newer constitutions. This is especially true for modern constitutions that enforce both older liberal rights and newer positive rights.<sup>128</sup> Where constitutional rights are many and are viewed as “principles” requiring optimization, as in Germany, approaches that seek to give each principle its proportional due are likely to be of great appeal.<sup>129</sup> In the United States, conflicts between constitutional values—like free press versus fair trial—exist but are perceived to arise less often. This in part reflects the relative terseness of the Constitution and its failure to include positive rights as such. But it also reflects the predominantly negative contemporary view of those rights that do exist.<sup>130</sup> The Court has resisted arguments that would impose positive obligations on the government to enable the realization of rights, except in limited categories, such as the rights to counsel and to appeal in criminal cases. There are accordingly fewer perceived conflicts in rights and thus less felt need to find ways of reconciling such conflicts.<sup>131</sup> The absence of positive obligations also affects other aspects of U.S. doctrine, in ways that

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<sup>127.</sup> See Grimm, *supra* note 2, at 384–86 (noting the significance of Section 1 in Canadian development of proportionality doctrine and also noting the relative insignificance of textual limitations clauses in German courts’ development of comparable proportionality doctrine).

<sup>128.</sup> See Adam Liptak, ‘*We the People*’ Loses Appeal with People Around the World’, N.Y. TIMES, Feb. 6, 2012, <http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html> [<http://perma.cc/PD8S-LR5F>] (identifying the relative paucity of individual rights guarantees as a reason that countries are no longer modeling their constitutions on the U.S. Constitution).

<sup>129.</sup> See Stone Sweet & Mathews, *supra* note 37, at 97–111 (describing the German theory of rights and the historical rise of proportionality analysis in German courts).

<sup>130.</sup> This “negative-only” view of the rights protected has not always been clearly dominant. See, e.g., Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) (arguing that a theme of recent cases has been the need for affirmative action, in contrast with prior practice, to advance the goal of equality); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that recent decisions should be understood as reflecting a duty to secure minimum levels of welfare).

<sup>131.</sup> It is perhaps not a coincidence that Justice Breyer, in some cases in which he has argued for some form of proportionality review of statutes, has also seen in those cases First Amendment interests on both sides. See, e.g., Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[C]onstitutionally protected interests lie on both sides of the legal equation . . . ”).

call for caution in considering methodological shifts that are more than incremental in character.<sup>132</sup>

There are other contributing factors apart from the text and age of the U.S. Constitution. Unlike countries in Europe, the United States is not nested in a tightly woven supranational structure of economic union, nor deeply embedded in an effective regional human rights convention, enforced by a transnational court. Courts in Europe have incentives to draw on, and to anticipate, rulings of the two European courts, each of which relies on forms of proportionality review. Unlike Canada, the United States is not part of the Commonwealth, which has arguably promoted more sharing of jurisprudences across national lines. U.S. courts thus have not experienced to the same degree the flow of cases from national to supranational courts that is common in Europe, nor the regular interchange that occurs among judges of the Commonwealth nations.<sup>133</sup> Its relative isolation from these influences, or those of international tribunals, is reflected both in the hesitation of the political branches to ratify human rights conventions,<sup>134</sup> and in the Supreme Court's recent case law.<sup>135</sup>

Over time, moreover, the U.S. Supreme Court has developed distinctive discourses around rights. U.S. law does not generally discuss rights as being subject to external limitation; when U.S. jurists, lawyers, or scholars say a "right" has been "infringed," this is typically the end of analysis.<sup>136</sup> In Canada,

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<sup>132.</sup> In the United States, even "compelling interests" sufficient to overcome presumptive rights protections are optional, in the sense that governments may choose whether or not to advance them; in Germany, by contrast, the Basic Law is understood to impose some affirmative duties on government. See JACKSON, *supra* note 118, at 222-23.

<sup>133.</sup> See *id.* at 40-41, 55-57, 91-94, 95-97, 99-102, 154, 261 (discussing European integration and the Commonwealth).

<sup>134.</sup> See *supra* note 38; Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

<sup>135.</sup> See, e.g., cases cited *supra* note 38.

<sup>136.</sup> This approach is often associated with the idea that rights act like "trumps" over other interests against government action. See DWORKIN, *supra* note 34, at xi (calling rights "political trumps held by individuals"); Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 166 (Jeremy Waldron ed., 1984) (describing rights as "trumps over some background justification for political decisions that states a goal for the community as a whole" and arguing that rights are needed "only when some decision that injures some people nevertheless finds prima-facie support in the claim that it will make the community as a whole better off"); see also Grégoire Webber, *On the Loss of Rights*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 123 (Grant Huscroft et al. eds., 2014). But cf. Fallon, *supra* note 6, at 1316-17 (distinguishing "triggering rights," which prompt strict scrutiny, from "ultimate" rights); Gardbaum, *supra* note 5, at 423-25 (noting instances where the U.S. Supreme Court has identified a "two-step analysis" of rights' infringement and of justifications for limits). Gardbaum suggests that without a textual limitations clause, "[w]here all limits are judicially implied, it is far easier to justify such implication if all limits are thought of as part of the first step, part of the undoubtedly legitimate judicial function of in-

the scope of interests that the right protects is determined first from the perspective of the rights-holder; if the “right” is infringed, analysis does not end, but instead the government’s reasons for limitation are then separately considered. Likewise, in Germany, according to a leading scholar of proportionality review, rights that are “principles” are understood to be “optimization” requirements which must be protected to the maximum extent possible but which may be limited if there are strong enough reasons for the government to do so.<sup>137</sup> In the United States, courts often blend the two ideas—which personal interests a right protects, and how the government may legitimately act to limit freedom—and articulate a “right” only after internally accounting for limitations deemed warranted by the government interests.<sup>138</sup>

At the same time, there are distinctively American fears about judging and the role of judges, in part an inheritance of legal realism and critical legal studies (CLS). This kind of skepticism about law, judging, and judges contrasts with German (and European) forms of optimism about the possibility of law as a practice distinct from politics.<sup>139</sup> If legal realism and CLS contribute to a gen-

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terpreting the meaning and scope of a constitutional right, rather than . . . part of the second step of specifying when the right as defined may be overridden.” *Id.* at 426.

137. Robert Alexy famously characterized most rights as principles, to be understood as “optimization requirements,” whose mandate—to optimally protect those rights—must be evaluated against the government’s efforts or obligation to advance and protect against other rights and interests. ALEXY, *supra* note 19, at 47–50.
138. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (asking what the Fourteenth Amendment forbids and finding that “because the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment”). In Canada, by contrast, the Court first asks whether the interests advanced by the challenger are protected by the substantive Charter provision relied on before analyzing the government’s justifications for its action (although there is debate over the role of particular considerations in the Section 15 equality analysis as compared with the Section 1 justification analysis). See, e.g., Quebec (Attorney General) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.); see also Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 3, 17 (Vicki C. Jackson & Mark Tushnet eds., 2002) [hereinafter Weinrib, *Constitutional Comparativism*] (explaining that courts in Canada first examine “the rights themselves” from a purposive perspective, and if there is a finding of a violation, the government then has the opportunity to justify the intrusion on rights); Lorraine E. Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada’s Constitution*, 80 CAN. BAR. J. 699, 737 (2001) [hereinafter Weinrib, *Supreme Court of Canada in the Age of Rights*] (asserting that under the Charter, “[p]urposive interpretation is the standard approach” and that “[i]t explicates the normative principles and values that legitimate elevating certain fundamental interests as supreme law and thus as situated beyond the reach of the ordinary political process”).
139. See BOMHOFF, *supra* note 2, at 54–56; COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 82–93 (contrasting European “epistemological optimism” with U.S. “epistemological skepticism”); cf. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971

eral skepticism about the capacity of law to constrain, then fears of judging were also reinforced by what we might call the ghosts of *Lochner*<sup>140</sup> and *Den- nis*,<sup>141</sup> two cases that have come to be viewed as “negative precedents,” or cautionary notes of what not to repeat.<sup>142</sup>

As Richard Fallon has argued, *Carolene Products* laid the foundation for the Court to develop bifurcated categories of review, including more deferential review of economic regulation and heightened review of laws adversely affecting discrete and insular minorities, the representative process, or the protections of the first eight amendments.<sup>143</sup> The vices of *Lochner* are debated,<sup>144</sup> but *Carolene Products*, and the ensuing bifurcation of standards of review into rational basis and strict scrutiny, responded to two major critiques of *Lochner* by creating a clear hierarchy of rights: it rejected liberty of contract as an object of heightened attention and seemed to limit judicial intrusion on political choices, confining judicial discretion by “committing” the Court to two discrete standards of review,<sup>145</sup> each of which was close to outcome determinative—strict scrutiny almost always fatal; rational basis rarely so.<sup>146</sup>

Yet over time, the persuasive, predictive, and constraining force of this bifurcation diminished. The concept of a rigid division in standards of review was implicitly challenged in Justice Thurgood Marshall’s 1970 dissent in *Dan-*

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(2004) (contrasting the U.S. commitment to popular will with the European commitment to reason).

<sup>140</sup>. *Lochner v. New York*, 198 U.S. 45 (1905). With thanks to the title of Louis Henkin’s article, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, *supra* note 134; see also Fallon, *supra* note 6, at 1293 (“There can be little doubt that the ghost of *Lochner* overhung constitutional law during the period in which strict scrutiny developed.”).

<sup>141</sup>. *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>142</sup>. See *supra* note 33.

<sup>143</sup>. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>144</sup>. “Lochnerism” may refer either to a concern over the judicial role vis-à-vis the legislature, or to a concern with the incorrectness of the *Lochner* Court’s substantive economic theory. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 197, 263 (1992); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 1-15 (2004) (noting overwhelming though not unanimous condemnation of *Lochner*, and arguing that *Lochner*’s critics had, in addition to the two concerns noted above, concern for Court-created crises of governance, as arguably occurred in the early New Deal). On revisionist understandings of *Lochner* as a principled effort to sustain long-standing legal categories, see Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999) (discussing works by Fiss, Gilman, and Horowitz).

<sup>145</sup>. See Fallon, *supra* note 6, at 1270-71; see also David A. Strauss, *Is Carolene Products Obsolete?*, 4 U. ILL. L. REV. 1251, 1267-69 (2010) (arguing for the significance and continuing vitality of *Carolene Products*).

<sup>146</sup>. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

*drige v. Williams*,<sup>147</sup> which argued that defining the level of benefits for children in poor families was not the kind of economic regulation of commercial enterprises on which the *Carlene Products* distinction rested.<sup>148</sup> Questioning of the rigid tiers of review has extended to more recent debates about whether sexual orientation is a suspect or quasi-suspect category.<sup>149</sup> With the addition of intermediate scrutiny,<sup>150</sup> as well as hard-to-account-for variations in the application of the various tiers of review,<sup>151</sup> the predictability of these categories has been somewhat diminished.<sup>152</sup> Recent years have also seen some resurgence of enhanced constitutional protection for economic rights, such as in takings jurisprudence<sup>153</sup> and commercial speech cases.<sup>154</sup>

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<sup>147.</sup> 397 U.S. 471 (1970).

<sup>148.</sup> *Id.* at 519-25 (Marshall, J., dissenting). A few years later Justice Stevens also criticized the tiered standards of review. *See Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

<sup>149.</sup> *See, e.g.*, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) (refusing to apply “rigid categorical rubrics” in invalidating the Defense of Marriage Act); *see also* Recent Case, *Equal Protection – Sexual Orientation – First Circuit Invalidates Statute that Defines Marriage as Legal Union Between One Man and One Woman*, 126 HARV. L. REV. 611, 614 (2012) (arguing that *Massachusetts* should be read as a “contextually sensitive form[] of balancing not subject to” traditional rigidity). The Court was repeatedly ambiguous about the standard of review for discrimination based on sexual orientation, in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), each of which invalidated laws disadvantaging minority sexual orientations and identities.

<sup>150.</sup> *See Craig*, 429 U.S. 190; *id.* at 218 (Rehnquist, J., dissenting) (using the term “intermediate” level scrutiny” to describe the Court’s approach).

<sup>151.</sup> Compare *Plyler v. Doe*, 457 U.S. 202 (1982) (applying rational basis scrutiny to strike down a Texas statute imposing a fee to educate unlawful alien children), *with N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (applying rational basis scrutiny to uphold ban on employing methadone users); compare *United States v. Virginia*, 518 U.S. 515 (1996) (applying intermediate scrutiny to hold that a ban on admitting women to the Virginia Military Institute, and a remedial order to require that a separate facility be developed for women, were both unconstitutional), *with Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (applying intermediate scrutiny to uphold gender-based differences in treatment of children born abroad to American citizen mothers and fathers).

<sup>152.</sup> *See Suzanne B. Goldberg, Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 (2004) (arguing that disputes over the strictness of strict scrutiny and the deference in rational basis review have “shaken the foundations of the Court’s three-tiered equal protection framework”); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (arguing that “strict scrutiny” is applied with varying rigor in different contexts and is often not “fatal”).

<sup>153.</sup> *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). The holdings of both cases were seemingly preserved in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546-48 (2005).

<sup>154.</sup> *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

If a reaction to Lochnerism helps explain the initial development of the two-tiered structure of review signaled in *Carolene Products*, the perceived failure of balancing to provide appropriate protection to First Amendment interests in *Dennis*<sup>155</sup> may have contributed to the development of more categorical approaches to restrictions on speech inciting violence, as in *Brandenburg v. Ohio*.<sup>156</sup> Such developments in turn have contributed to the notion that U.S. constitutional law more generally rests or should rest on categorical rules.<sup>157</sup> Concerns for proportionate government action may, however, have informed the development of *Brandenburg's* categorical rule.<sup>158</sup> Exceptions to free speech rules in recent years, including *Holder v. Humanitarian Law Project*,<sup>159</sup> have cre-

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<sup>155.</sup> *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion) (adopting Learned Hand's balancing formulation, that courts in each case must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"); *id.* at 525 (Frankfurter, J., concurring in the judgment) (suggesting deference to legislative balance, asking "who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts"). *Dennis* has been widely condemned for failing to provide appropriate protection to free speech. See, e.g., Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 117-19, 119 nn.16-17.

<sup>156.</sup> 395 U.S. 444 (1969) (per curiam). The Court there stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. The test at least appears to focus initially on the nature of the advocacy, rather than on any calculation of benefits and harms as appeared in *Dennis*. See also Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240-42 (interpreting *Brandenberg* to require express advocacy inciting imminent law violation that is likely to occur). For a categorical approach in the regulation of racist expressions, see *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>157.</sup> See BOMHOFF, *supra* note 2, at 122-89 (arguing that the U.S. debate over "balancing" as opposed to "categorical" or "definitional approaches" was centered on disputes over the First Amendment arising out of Cold War fears of communism).

<sup>158.</sup> That is, the *Brandenburg* standard could be understood as having been designed, in part, to help prevent overreactions needlessly restricting speech freedoms. See Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 930 (2009) ("The *Brandenburg* test . . . could be viewed as defining what regulations are sufficiently narrowly tailored to the government's interest in preventing violence . . . ."); see also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2454 (1996).

<sup>159.</sup> 561 U.S. 1 (2010); see also *Hill v. Colorado*, 530 U.S. 703, 719-25 (2000) (treating a law that prohibits approaching persons within one hundred feet of abortion clinics for purposes of education or protest as a content-neutral regulation of speech not subject to strict scrutiny); cf. *R.A.V.*, 505 U.S. 377 (recognizing an exception from the "fighting words" exception to the presumptive ban on content-based regulation of speech).

ated a more complex and less determinate overall structure.<sup>160</sup> Other categorical constitutional rules adopted, for example, in criminal procedure, including Fourth Amendment law, have been followed by arguably even more complex exceptions.<sup>161</sup>

As even our more categorical constitutional rules have become increasingly uncertain and complex,<sup>162</sup> is this a time for some reorientation of U.S. law towards proportionality?

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<sup>160.</sup> See, e.g., Martha A. Field, Holder v. Humanitarian Law Project: *Justice Breyer, Dissenting*, 128 HARV. L. REV. 434, 439 (2014) (“[Humanitarian Law Project (HLP)] throws wide open our present understanding of First Amendment jurisprudence. What is the dividing line separating cases to be governed by *Brandenburg* and our established First Amendment understandings from cases to be analyzed in accordance with HLP?”). On the more general question of the clarity and stability of First Amendment rules protecting speech, see Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011); and Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 17, 23–26 (2012), [http://columbialawreview.org/wp-content/uploads/2012/01/16\\_Huq.pdf](http://columbialawreview.org/wp-content/uploads/2012/01/16_Huq.pdf) [http://perma.cc/C4E7-6Q8G], which notes “discontinuity” between material support and campaign finance case law and expresses “skepticism” about possible justifications for the variances.

<sup>161.</sup> The Warren Court period saw a number of prophylactic constitutional rules of criminal procedure develop, including *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), applying the Fourth Amendment exclusionary rule to the states to hold that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible,” and *Miranda v. Arizona*, 384 U.S. 436 (1966), providing bright-line rules for the treatment of in-custody suspects before they could be interrogated. See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (describing the *Miranda* Court’s prophylactic approach). Similarly categorical rules to protect criminal defendants’ constitutional rights developed in other areas. See Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1500–01 (2006). These rules, however, became complicated by numerous exceptions (and an increased rhetoric of balancing), *see id.* at 1502–03, notably in exceptions to the Fourth Amendment exclusionary rule, *see* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504–20 (1996). If the Warren Court’s criminal procedure decisions migrated from standards to rules that sought to ease administrability and deter police misconduct, more recent cases have developed other bright lines to protect police misconduct from judicial review. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that other circumstances are irrelevant to the validity of an arrest once an officer has probable cause based on what he saw to believe an offense was committed); *Whren v. United States*, 517 U.S. 806 (1996) (holding that a police officer’s subjective intentions are irrelevant to evaluating the constitutionality of a traffic stop, as is a violation of local regulations).

<sup>162.</sup> See Fallon, *supra* note 6, at 1297–1300, 1302–03 (noting inconsistencies in the application of strict scrutiny and the development of intermediate scrutiny tests in several areas, commenting that “the introduction of an intermediate tier of scrutiny signals that the Supreme Court no longer feels the need for the degree of self-discipline that it once developed a mostly two-tiered doctrinal structure to provide,” and arguing that there are now three different “strict scrutiny” tests, only one of which is close to categorical); *see also supra* note 152.

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### III. BENEFITS OF PROPORTIONALITY REVIEW FOR U.S. CONSTITUTIONAL LAW

In this Part, I argue that in at least two areas of constitutional law, greater reliance on proportionality would beneficially enhance the protection of individual rights. Working from the facts to the law in the common law tradition, Part A considers recent Fourth Amendment case law in which the Court rejected arguments that arrests, or searches related to pretrial detention, should be limited by proportionality principles, and it contrasts such decisions with Canadian case law. Part B explores how the absence of a “proportionality as such” inquiry diminishes the force of U.S. rules against content-based regulation under strict scrutiny, using *Humanitarian Law Project* as an example. Finally, Part C advances some more general, theoretical arguments for increased use of structured proportionality review and proportionality as a principle in constitutional adjudication.

#### A. Regulating Police Behavior Under Constitutional Norms

##### 1. Atwater v. City of Lago Vista and Fourth Amendment Case Law

In *Atwater v. City of Lago Vista*,<sup>163</sup> the Court found no Fourth Amendment violation in the arrest of a motorist for a non-jailable traffic offense.<sup>164</sup> Atwater was driving her two young children in their neighborhood when she was stopped by a police officer for not wearing her seatbelt and not having her children in seatbelts.<sup>165</sup> Arresting Atwater, the officer denied her request to ask a neighbor to care for the children, indicating that he would bring them to the police station.<sup>166</sup> Atwater’s hands were cuffed behind her back; she was placed in the back of the police car—without a seatbelt—and driven to the station.<sup>167</sup>

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<sup>163</sup>. 532 U.S. 318 (2001).

<sup>164</sup>. *Id.* at 323.

<sup>165</sup>. *Id.* at 323–24. The officer shouted at Ms. Atwater “We’ve met before,” and “You’re going to jail!”; he had previously stopped her in the same neighborhood, mistakenly thinking she had committed a seat belt offense. *Id.* at 324 & n.1; *Atwater v. City of Lago Vista*, 195 F.3d 242, 252 (5th Cir. 1999) (Dennis, J., dissenting); *see also id.* at 248 (Wiener, J., dissenting) (stating that the facts would have supported a jury verdict that the officer had “a personal crusade or possibly even a vendetta”); *id.* at 246 (Garza, J., dissenting) (asserting that as a Texas lawyer for sixty years and an Article III judge in Texas for thirty-eight years, he knew that ordinarily a traffic stop like this would result in a citation and concluding that the officer acted unreasonably and in violation of the Fourth Amendment).

<sup>166</sup>. *Atwater*, 532 U.S. at 368–69 (O’Connor, J., dissenting). A neighbor then happened to come by and took charge of the children. *Id.*

<sup>167</sup>. *Id.* at 369.

She was released about an hour later, paid a \$50 fine for the seat belt offense, and discovered her car had been towed.<sup>168</sup> She sued for damages, including distress-related medical costs for herself and one child.<sup>169</sup>

The Court described the police officer's conduct in arresting the motorist as involving "merely gratuitous humiliations" and inflicting "pointless indignity and confinement."<sup>170</sup> Indeed, the Court wrote, her claim "clearly outweighs anything the City can raise against it specific to her case."<sup>171</sup> Acknowledging that "[i]f we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail," the Court noted that Atwater was an "established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation."<sup>172</sup>

Yet the Court rejected Atwater's Fourth Amendment challenge: history suggested and functional concerns required that police officers be treated as having lawful discretion to arrest for *any* offense with probable cause.<sup>173</sup> To hold otherwise, according to the Court, would impose unwarranted burdens on police officers of knowing details of criminal codes and anticipating likely charging decisions, thereby creating incentives to under-enforce criminal law by officers making split-second decisions.<sup>174</sup> (A similar structure of analysis is found in *Florence v. Board of Chosen Freeholders*,<sup>175</sup> involving visual strip and cavity searches at pretrial detention facilities.<sup>176</sup>)

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<sup>168.</sup> *Id.* at 324 (majority opinion).

<sup>169.</sup> *Atwater v. City of Lago Vista*, 165 F.3d 380, 383 (5th Cir. 1999).

<sup>170.</sup> *Atwater*, 532 U.S. at 346-47.

<sup>171.</sup> *Id.* at 347.

<sup>172.</sup> *Id.* at 346 (emphasis added).

<sup>173.</sup> *Id.* at 342-45, 347-54.

<sup>174.</sup> *Id.* at 348-51.

<sup>175.</sup> 132 S. Ct. 1510 (2012).

<sup>176.</sup> The *Florence* Court described how, after passing through a metal detector, all arriving detainees

were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Apparently without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. This policy applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process.

*Id.* at 1514 (citations omitted). Petitioner argued that the detention facility should sort pre-trial detainees accused of more serious offenses from those accused of less serious offenses and graduate the intrusiveness of the searches accordingly, unless there was some particular basis for suspicion that an arrestee might be concealing dangerous substances. In *Florence*, as

If a case like *Atwater* had arisen in Canada, the first question the Canadian Court would likely have addressed is whether the plaintiff had interests protected by the provisions analogous to the Fourth Amendment.<sup>177</sup> The first question in fact addressed by the *Atwater* Court was the scope of common law authority to make an arrest.<sup>178</sup> Had the U.S. Court followed the structured proportionality review approach, it would have considered whether Atwater's interests were within the scope of interests protected by the Fourth Amendment before going on to consider whether the search or seizure was justified, that is, reasonable. The amendment's text plainly suggests that searches and seizures must be reasonable. It provides: "The right of the people to be secure in their persons . . . against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."<sup>179</sup> The U.S. Supreme Court did not conduct its analysis in this order. Moreover, it did not address potential harm to Atwater's children.<sup>180</sup>

Whether "the people" can feel "secure in their persons" knowing that any traffic infraction can result in their being jailed deserves more attention. Justifications that sound only in authority, based on common law practice, are not so

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in *Atwater*, the Court rejected arguments that a more individualized approach was constitutionally required to avoid disproportionately humiliating or intrusive treatment. *See id.* at 1517-18 (citing *Atwater*, 532 U.S. at 347, for the proposition that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need").

<sup>177</sup>. In resolving the threshold question of Charter Section 8, whether a "search" or "seizure" has occurred, the Canadian Court considers whether the challenger had a "reasonable expectation of privacy," R. v. Edwards, [1996] 1 S.C.R. 128, ¶¶ 30-39 (Can.); for Section 9, in resolving the threshold question whether a challenger was "detained," the Court asks whether a reasonable person in the position of the accused would feel she was free to go or had to comply with police requests, considering both physical and psychological coercion. *See* R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353, ¶¶ 20-21, 24-29 (Can.).

<sup>178</sup>. 532 U.S. at 326-40.

<sup>179</sup>. U.S. CONST. amend. IV (emphasis added).

<sup>180</sup>. Although harm to third parties might seem obviously relevant to determining the reasonableness of a search or seizure, in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014), the Court held that the presence of a passenger in a car driven by a fleeing felon was irrelevant to whether the felon's Fourth Amendment rights had been violated when police fired fifteen shots into the vehicle. The Court's reasoning was that Fourth Amendment rights are personal, not vicarious. *Id.* Under proportionality analysis, or any substantive analysis of reasonableness, it is hard not to think that the possibility of "collateral" injury bears on the "reasonableness" of the police officers' actions. *See, e.g.*, R. v. Thompson, [1990] S.C.R. 1111, 1143-45 (Can.) (noting that failure to take steps to prevent wiretapping of many members of the public's conversation is a basis for finding "unreasonableness" of a search under Section 8). Subsequent Canadian case law holds that third-party interests are not relevant to whether the claimant was subject to a "search or seizure" but may well be "relevant in the second stage of [Section 8] analysis, namely whether the search was conducted in a reasonable manner." *Edwards*, [1996] 1 S.C.R. ¶¶ 34-38.

persuasive to the modern ear; and proportionality tests do not stop with the question of authorization.<sup>181</sup> The Court's methodology, which defined the rights at stake only in relation to an ambiguous common law history and its analysis of the government's interests, left an essential aspect of the question under-explored.

The *Atwater* Court did engage in some balancing or weighing of government needs in deciding between a case-by-case or rule-based approach, and it chose a categorical rule. The Court treated police officers as needing prophylactic protection, reasoning that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."<sup>182</sup> The Court made empirical judgments—concerning the supposed dearth of abusive arrests and the need to avoid "a systematic disincentive to arrest"—in order to strike "a responsible . . . balance" through its categorical rule.<sup>183</sup>

As the dissenters argued, qualified immunity doctrine already protects officials from monetary liability under unclear legal standards.<sup>184</sup> Some focus on the proportionality of the officer's conduct, examining the reasons for this conduct, would have little potential for interference with law enforcement and would better protect citizens' rights to be secure in their persons.<sup>185</sup> Yet the Court offered little discussion of the scope of the interests protected by Fourth Amendment rights or of why the police officer did not use less restrictive alternatives reasonably available to him; its suggestion that the political process could control abuses,<sup>186</sup> and its reference to a possibly different approach in "extraordinary" circumstances,<sup>187</sup> left the decision only partially justified and partially transparent.

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<sup>181.</sup> See BARAK, *supra* note 22, at 107-24 (discussing the requirement of authority for limiting rights, as an inquiry that precedes proportionality analysis of the means used); *id.* at 243-454 (discussing the elements of proper purpose, rational connection, minimal impairment, and proportionality as such); cf. BEATTY, *supra* note 1, at 45-46 (discussing how the German Constitutional Court seeks to "evaluate and reconcile the competing interests" rather than to rely on textual exegesis or case law). In minority communities, the need for adequate justificatory accounts may be particularly acute. See *infra* text accompanying note 249.

<sup>182.</sup> *Atwater*, 532 U.S. at 347.

<sup>183.</sup> *Id.* at 347, 351.

<sup>184.</sup> *Id.* at 367 (O'Connor, J., dissenting).

<sup>185.</sup> See *id.* ("[Qualified immunity] allays any concerns about liability or disincentives to arrest.").

<sup>186.</sup> *Id.* at 353 (majority opinion).

<sup>187.</sup> *Id.* at 353-54.

## 2. A Canadian Comparison

For comparison, let's turn briefly to a recent Canadian decision<sup>188</sup> concerning the Canadian Charter's constitutional protections of the "right to be secure against unreasonable search or seizure"<sup>189</sup> and "the right not to be arbitrarily detained or imprisoned."<sup>190</sup> In *Aucoin*, a Canadian police officer made a traffic stop because of a license plate irregularity; on questioning the nineteen-year-old driver, the officer found that he had consumed alcohol in violation of traffic laws prohibiting new drivers from drinking.<sup>191</sup> Having decided to give the driver a ticket, the officer also decided to place the driver in the back of the police car while he wrote up the citation.<sup>192</sup> For safety reasons, the officer conducted a pat-down search before putting the driver in the back of the patrol car and during that search discovered illegal drugs.<sup>193</sup> The parties and the Court agreed that the initial detention of the driver in the traffic stop was lawful. The question was whether the decision to put the driver in the back seat of the patrol car was a reasonable exercise of the authority to detain.<sup>194</sup>

In the Canadian Court's words, the issue was not whether there was authority to detain, but whether the officer was *justified in exercising the authority as he did*.<sup>195</sup> It was the "shift in the nature and extent of . . . detention" for "two relatively minor motor vehicle infractions" that created the constitutional viola-

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188. R. v. Aucoin, 2012 SCC 66, [2012] 3 S.C.R. 408 (Can.).

189. Canadian Charter of Rights and Freedoms § 8, Part I of the Constitution Act, 1982, *being Schedule B to the Canada Act, 1982*, c. 11 (U.K.).

190. *Id.* § 9.

191. *Aucoin*, [2012] 3 S.C.R. ¶¶ 2-3, 55.

192. *Id.* ¶ 4.

193. *Id.* ¶¶ 5-7.

194. See *id.* ¶ 30. *Aucoin* challenged the lawfulness of the pat-down search, which in this factual context, turned on whether under Section 9 of the Canadian Charter, "securing the appellant in the cruiser . . . was reasonably necessary"; the Court found that it was not, and thus there was no authority for the pat-down search. *Id.* ¶¶ 30, 44; see *infra* note 201. The issue in the case was the reasonableness of the officer's actions, not whether a statute found to infringe a Charter right could be "salvaged" by a Section 1 proportionality analysis; the Court's application of the reasonable necessity requirement for detentions under Section 9 incorporates concern for the proportionality of police actions. See *Aucoin*, [2012] 3 S.C.R. ¶ 44; R. v. Clayton, 2007 SCC 32, [2007] 2 S.C.R. 725, ¶ 21 (Can.).

195. *Aucoin*, [2012] 3 S.C.R. ¶ 35 ("I do not see this case as turning on whether Constable Burke had the authority to detain the appellant in the rear of his police cruiser, having lawfully stopped him for a regulatory infraction. Rather, the question is whether he was justified in exercising it as he did in the circumstances of this case."); cf. R. v. Collins, [1987] S.C.R. 265, 278 (Can.) (stating that a search is unreasonable and in violation of Charter Section 8 unless the search "is authorized by law[,] . . . the law itself is reasonable[,] and . . . the manner in which the search was carried out is reasonable").

tion.<sup>196</sup> Placing the driver in the back seat of the police car, especially with the accompanying pat-down, “increased restrictions on the appellant’s liberty interests . . . [and] altered the nature and extent of the appellant’s detention in a fairly dramatic way—especially when one considers that the infractions for which he was being detained consisted of two relatively minor motor vehicle infractions.”<sup>197</sup> Given the minor character of the offense, the decision to detain in the car did not meet the test of being “reasonably necessary” under all the circumstances, and so the detention and accompanying pat-down were not constitutional.<sup>198</sup> The Canadian Court was unanimous in this holding.<sup>199</sup>

Canadian law thus adopts an alternative approach, insisting on a more case-by-case approach to examining whether a police authority has been exercised in a reasonable and proportionate way.<sup>200</sup> A comparison with *Atwater*

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<sup>196.</sup> *Aucoin*, [2012] 3 S.C.R. ¶ 34.

<sup>197.</sup> *Id.*

<sup>198.</sup> See *id.* ¶¶ 36-42 (evaluating reasonable necessity “in the totality of the circumstances” of the particular case). The Court also noted that there were less intrusive alternatives available, including waiting for back-up (which was “close at hand”) before writing the ticket. *Id.* ¶ 42. It added that “a different factual matrix may well have supported a finding of reasonable necessity,” *id.* ¶ 43, consistent with Canadian case law’s emphasis that the question whether a detention is “reasonably necessary” is a highly contextual one. See *Clayton*, [2007] 2 S.C.R. ¶ 31 (explaining the need to consider “the nature of the situation, including the seriousness of the offence, . . . information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances,” in order to “balanc[e] the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk”).

<sup>199.</sup> Notably, the Court split on whether the cocaine obtained from the search should be admitted into evidence, with a majority ruling in favor of admissibility. See *infra* Part V.B (discussing Canada’s more flexible remedial rule, how it differs from the U.S. exclusionary rule, and possible implications for comparative purposes). Scholarly commentary to date on *Aucoin* has mostly focused on the exclusion from evidence question and criticized the majority for allowing the evidence in. See Solomon Friedman & Michael A. Johnston, *A Supreme Court that Is Granting Power to the State, Not the Mann*, 60 CRIM. L.Q. 555, 567-70 (2014); W. Vincent Clifford, R. v. Aucoin: *Attenuating Circumstances or a Right Without a Remedy?*, FOR THE DEFENCE (Criminal Lawyers’ Assoc., Toronto, Can.), June 2013, at 2; cf. Steve Coughlan & Robert J. Currie, *Sections 9, 10 and 11 of the Canadian Charter*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS 801-02 n.28 (Errol Mendes & Stéphane Beaulac eds., 5th ed. 2013) (discussing *Aucoin*’s reining in of common law police powers).

<sup>200.</sup> Although concern for effective crime control lies behind the U.S. Supreme Court’s analysis in many cases, including *Atwater*, it is difficult to determine the relationship of particular legal approaches to effective crime control or levels of criminal activity. For comparative analysis of the U.S. and Canadian criminal justice systems, see, for example, Marc Ouimet, *Crime in Canada and the United States: A Comparative Analysis*, 36 CAN. REV. SOC. 389, 405 (2008) (describing the role of gun ownership and residential patterns as determinants of criminal activity). While property crime rates may be higher in Canada, Ouimet, *supra*, at

suggests that some form of more individualized proportionality analysis may produce decisions that are both better reasoned and more protective of rights than the “categorical approach” employed by the U.S. Court.<sup>201</sup>

### B. “Strict Scrutiny” and the First Amendment

The First Amendment is an area in which U.S. law is typically described as being based on presumptive or definitional categories.<sup>202</sup> Would U.S. First Amendment law be improved by more attention to proportionality? If, for example, in applying the categorical presumption against content-based regulation, courts used as an additional test the question of “proportionality as such” from structured proportionality doctrine? Or if, in defining exemptions from the categorical presumption against content-based regulation, more attention were given to the principle of proportionality? To begin to answer these questions, consider first the Court’s recent decision in *Holder v. Humanitarian Law Project*.<sup>203</sup>

The case involved a challenge to a criminal statute prohibiting material support to designated terrorist groups. The challenge was brought by U.S.-

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405, Canadians are less likely to be the victims of homicide, aggravated assault, or robbery than are residents of the United States, see Maire Gannon, Juristat, *Crime Comparisons Between Canada and the United States*, JURISTAT (Can. Centre for Just. Stat., Can.), Dec. 18, 2001, at 2, 4; Ouimet, *supra*, at 405, and have greater trust and confidence in the police than do Americans, see Sanja Kutnjak Invkovic, *A Comparative Study of Public Support for the Police*, 18 INT’L CRIM. JUST. REV. 406, 422, 425 (2008); Julian V. Roberts, *Public Confidence in Criminal Justice in Canada: A Comparative and Contextual Analysis*, 49 CAN. J. CRIMINOLOGY & CRIM. JUST. 153, 167–68 (2007). By contrast, U.S. governments were reported to expend more per capita on policing and criminal justice than did Canada. See Frans van Dijk & Jaap de Waard, *Key Findings from the Study Legal Infrastructure of the Netherlands in International Perspective: Crime Control*, 8 EUR. J. ON CRIM. POL’Y & RES. 517, 523 (2000).

201. Aucoin found infringements of Charter Sections 8 and 9, but it did not go on to ask whether the actions were nonetheless justified under Section 1. The infringement of Section 9 arose because the detention in the car and accompanying patdown were not reasonably necessary; Section 8 was therefore violated because the search was not authorized by law, which also precluded justification under Section 1. The leading Canadian constitutional law treatise states that although the author believes Section 1 may apply to salvage a Section 8 infringement, “there is no illustrative case.” PETER HOGG, CONSTITUTIONAL LAW OF CANADA 48–2 (5th ed. 2007). To uphold such an infringement of Section 8 under Section 1, one would have to find that it was “demonstrably justified” to act in a manner determined to have been unreasonable—a logical conundrum.

202. See, e.g., Farber, *supra* note 158; Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5 (1992); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); cf. Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (discussing the importance of “keep[ing] the starch in” free speech doctrine).

203. 561 U.S. 1 (2010).

based NGOs that sought, *inter alia*, to provide training to certain designated terrorist groups (such as the Kurdistan Workers' Party (PKK) in Turkey) about how to invoke international law processes to advance their claims. Concluding that the statute involved a content-based regulation of speech, the Court nonetheless upheld the statute in light of the government's interest in combatting terrorism.<sup>204</sup>

The protective power of the categorical approach is called into question by this decision. The Court in *Humanitarian Law* failed even to mention an arguably controlling decision from 1969, *Brandenburg v. Ohio*,<sup>205</sup> which had held that speech believed to incite violence could be banned only when the speech's character was an incitement to imminent action and likely to cause imminent lawlessness. Under *Brandenburg*, it would have been difficult to uphold the material support statute as applied to speech designed only to promote lawful invocations of international procedures, as the speech had neither the purpose of inciting nor a likelihood of causing imminent lawlessness.<sup>206</sup>

As noted, the *Humanitarian Law* Court concluded that the statute regulated speech based on its content; it therefore subjected the statute to strict scrutiny, rejecting the government's argument for intermediate scrutiny.<sup>207</sup> The Court indicated that the correct standard to apply was "the more rigorous scrutiny" found in such cases as *Cohen v. California*,<sup>208</sup> *Texas v. Johnson*,<sup>209</sup> and *R.A.V. v.*

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<sup>204</sup>. *Id.* at 39-40.

<sup>205</sup>. 395 U.S. 444 (1969). *Brandenburg* had seemingly brought to a stable end the Court's half-century struggle to reconcile government efforts to suppress speech believed to be dangerous to the government with the First Amendment's protections of freedom of expression. For an account of that struggle, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1070-76 (7th ed. 2013) and sources cited therein.

<sup>206</sup>. See *Humanitarian Law Project*, 561 U.S. at 44 (Breyer, J., dissenting) ("No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*."); Field, *supra* note 160, at 438. Another line of cases, arising out of anti-Communist laws of the 1950s, suggested that under First Amendment freedom of association, the constitutionality of punishing membership in an organization with some unlawful goals depended on whether the membership was "active," in the sense of intending to aid in the accomplishment of those unlawful goals. *Scales v. United States*, 367 U.S. 203, 229-30 (1961); see also Field, *supra* note 160, at 437. Under this line of cases, it was argued in *Humanitarian Law Project* that plaintiffs could not be sanctioned for providing assistance toward the lawful goals of designated terrorist organizations; the Court, however, did not apply this line of cases either, suggesting that the statute did not bar "membership" or discussion but only the provision of "training" or other "services," 561 U.S. at 18.

<sup>207</sup>. *Humanitarian Law Project*, 561 U.S. at 26-27 ("O'Brien does not provide the applicable standard for reviewing a content-based regulation of speech, and § 2339B regulates speech on the basis of its content." (citations omitted)).

<sup>208</sup>. 403 U.S. 15, 26 (1971) (requiring a more "particularized and compelling" justification to suppress speech and reversing conviction for breach of peace for wearing a jacket with a vulgar expression on it in a courthouse); *Humanitarian Law Project*, 561 U.S. at 27-28.

*City of St. Paul.*<sup>210</sup> Although the Court was less than clear on precisely what that standard was, it appeared to be “strict scrutiny.”<sup>211</sup> The parties all agreed that combatting terrorism was a compelling government interest. The Court emphasized that the prohibition was narrow, insofar as it did not prohibit “independent” advocacy, and applied only to “knowing” support.<sup>212</sup> As applied to teaching terrorist groups how to petition international agencies, the Court concluded, the ban was sufficiently connected to combatting terrorism for three reasons: to prevent the freeing up of “fungible” resources that could be directed to unlawful acts; to obstruct terrorist groups from acquiring “legitimacy”;<sup>213</sup> and to avoid difficulties in relationships with allies in the fight against terrorism.<sup>214</sup> In responding to plaintiffs’ argument that there was no need to prohibit

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<sup>209.</sup> 491 U.S. 397, 412 (1989) (subjecting content-based prohibitions of expressive conduct—desecrating a venerated object, the American flag—to *Boos v. Barry*’s “most exacting scrutiny,” which the state’s asserted interest in promoting national unity did not meet); *Humanitarian Law Project*, 561 U.S. at 28. According to *Boos v. Barry*, “most exacting scrutiny,” as applied to political speech in a public forum, required meeting the compelling interest/narrow tailoring standard. 485 U.S. 312, 321 (1988). *But cf. Humanitarian Law Project*, 561 U.S. at 26 (denying that the prohibition was a pure regulation of political speech, because it was a prohibition of material support, albeit a content-based regulation of speech).

<sup>210.</sup> 505 U.S. 377, 395 (1992) (holding that a prohibition of cross-burning and other expressive conduct causing annoyance or offense based on race or color was a form of content-based regulation that could be justified only by a compelling government interest in a narrowly tailored statute, a standard not met there); *Humanitarian Law Project*, 561 U.S. at 27.

<sup>211.</sup> See *supra* notes 208–210.

<sup>212.</sup> *Humanitarian Law Project*, 561 U.S. at 26, 30, 39.

<sup>213.</sup> *Id.* at 30. Moreover, the Court reasoned, teaching international law to terrorist groups could be prohibited because “[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.” *Id.* at 37. The potential for disruptive, manipulative use of legal knowledge is, however, pervasively present.

<sup>214.</sup> *Id.* at 32–33. As the dissent notes, preventing “legitimacy” is a doubtfully legitimate goal of statutes prohibiting speech; and the other two goals had little empirical support with respect to activities like those of the plaintiffs. *Id.* at 47–52 (Breyer, J., dissenting). It is, moreover, unclear whether Congress intended the statute to apply to the plaintiffs’ activities: the statute itself, 18 U.S.C. § 2339B(i) (2012), states that “[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment.” The government had argued aggressively that the statute was *not* a content-based regulation of speech, but only a regulation of conduct with incidental effects, reviewable under intermediate scrutiny. *See Humanitarian Law Project*, 561 U.S. at 26. The Court disagreed, concluding that the statute was a content-based regulation of speech. *Id.* at 27. Given the government’s argument, however, Congress may not have realized that the statute could be applied as a content-based regulation of speech. It is therefore uncertain whether its provisions were intended to apply to these activities. Cf. Weinrib, *Supreme Court of Canada in the Age of Rights*, *supra* note 138, at 740 (arguing that Canadian law’s requirement that a challenged act be authorized or “prescribed by law” in a statute or regulation ensures that democratic deliberation has been brought to bear on laws limiting the exercise of rights).

their nonviolent education and training activities, the Court further accepted Congress's finding that "any contribution" to a terrorist organization facilitates its terrorist conduct—a finding the Court found was "justified" in an area where concrete information was often unavailable but serious risks were real.<sup>215</sup> This deference to the government raises echoes of *Dennis* and casts further doubt on the constraining character of the "categorical" approach to free speech.

There is much to debate about the Court's analysis in *Humanitarian Law*; I focus here only on two methodological points relating to structured proportionality analysis.

First, it is possible to understand the Court as saying that the statute was sufficiently narrowly tailored to the government's compelling interest in combatting terrorism.<sup>216</sup> It is not clear, however, how seriously the Court took the idea of narrow tailoring (which is analogous to the minimal impairment step); it did not, for example, explain how the "contribution" of training in international law could be "fungible" with support for terrorist activities, in the way other forms of contribution (such as money) could be. It arguably applied a less stringent means-ends test of whether the prohibition could be said rationally to serve the government's asserted interests at all.<sup>217</sup> What the Court may really have been conveying was the overriding importance of the government interest relative to the free speech interests affected by the specific statutory prohibition. Had the Court followed a more structured analysis<sup>218</sup> it would be

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<sup>215</sup>. *Humanitarian Law Project*, 561 U.S. at 28-30. But cf. *supra* note 214 (questioning whether Congress intended such a reading of the statute).

<sup>216</sup>. *Id.* at 26 ("[T]he statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.").

<sup>217</sup>. See *id.* at 28-32 (explaining various reasons why Congress was "justified" in thinking that cutting off all material support would help weaken or delegitimize terrorist groups); *id.* at 33-35 (explaining why the Court accepted the Executive Department's affidavits that it is not "possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities," without requiring the government to show that speech to provide training in international law has the same potential for supporting violent activities as other forms of material support aimed at nonviolent activity, for example, contribution of funds for food).

<sup>218</sup>. Under *Oakes*, even if a restriction on expression is rationally related to a pressing and important government interest, and even if the restriction minimally impairs the plaintiff's speech rights, the courts must, in order to sustain it, find that the statute is proportionate as such—meaning that the objective advanced was more significant than the harm to the plaintiff's expressive rights. Under U.S. "strict scrutiny," a statute that passed the first two queries would be upheld, regardless of whether the harm to rights were greater or less than the benefit towards compelling interests. *Humanitarian Law Project* might be understood as relaxing the narrow tailoring/least restrictive alternative test in light of its implicit evaluation of "proportionality as such" in matters involving terrorism. See *infra* note 223. Alternatively,

easier to understand whether the Court was modifying (or abandoning) narrow tailoring as a requirement in some class of national security cases. Second, addressing all of these elements might not only clarify the doctrine but also better protect free speech, which is always under particular stress during times of war or perceived security threats. Governments that will be held accountable for failures of security may in good faith believe that broad prohibitions on “support” are needed to provide the greatest assurance against future terrorism, without necessarily considering whether any marginal gain in security by prohibiting peaceful speech, in the form of teaching foreign groups about international law, justifies the harm to free speech values. “Least restrictive alternative” analysis might be understood to accept the government’s goals (assuming they are “compelling”) without evaluating their relative force vis-à-vis intrusion on rights. The added question of “proportionality as such” enables a court, even as it defers to government expertise on the nature of security risks, to exercise independent judgment on whether the risk reductions justify the harm to free speech rights.<sup>219</sup> Because U.S. courts do not use structured proportionality doctrine in their constitutional jurisprudence, they may not even consider the appropriate relationship of government goals to free speech rights, captured by “proportionality as such,” or may do so *sub silentio*, to the detriment of both rights protection and the transparent and consistent development of constitutional law.

Consider, again, *United States v. Alvarez*,<sup>220</sup> the Stolen Valor Act case. A separate evaluation of the “less restrictive means” and “proportionality as such” tests might have clarified the decision. Although both the plurality and Justice Breyer asserted that the criminal statute could not be upheld because the government’s interest in protecting the integrity of military medals could be advanced by other means, the plurality opinion, at least, was unclear about

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*Humanitarian Law Project* might be understood as accepting that there was no other way to advance the government’s interests in preventing terrorist groups from gaining legitimacy or persuading allies of the seriousness of U.S. anti-terrorism commitments. But under the *Oakes* test, even if there were no less restrictive and equally effective alternative to these ends, courts would in theory still ask whether the relative advancement of the government’s goals would justify so severe a limitation on speech and associational activities.

<sup>219.</sup> Cf. BARAK, *supra* note 22, at 414 (arguing that while the government has expertise and competence on security risks, the court has expertise in the protection of rights); *see also* HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel, 58(5) PD 807, 845 [2004] (Isr.), translated in 2004 ISR. L. REP. 264, 304 (“The military commander determines whether the separation fence will pass over the hills or in the plain. That is his expertise. We [the judges] examine whether the harm caused by this route to the local inhabitants is proportional. That is our expertise.”).

<sup>220.</sup> 132 S. Ct. 2537 (2012).

whether other mechanisms were or needed to be viewed as equally effective.<sup>221</sup> Arguably, both the plurality opinion and Justice Breyer's combined the "less restrictive means" test with a *sub silentio* evaluation of "proportionality as such."<sup>222</sup> Important as the integrity of military honors may be, it may not have warranted an *ex ante* effort to suppress even false speech through a broad criminal sanction, if the goal of protecting military honors could have been served through less restrictive measures—even if those alternative measures were not quite as effective as a criminal sanction in deterring false claims. If this captures what the Justices in the majority were thinking, then "proportionality as such" might have better explained what motivated the decision.<sup>223</sup> Even if the outcome were not changed through the adoption of a structured proportionality approach, the Justices' reasoning would have been clarified.

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<sup>221.</sup> *Id.* at 2551 (plurality opinion) (stating that when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives," but not indicating whether the other means must be equally effective) (citation omitted); *see also id.* at 2555 (Breyer, J., concurring in the judgment) (asking "whether it is possible substantially to achieve the Government's objective in less burdensome ways").

<sup>222.</sup> Justice Breyer's opinion is explicit in applying an "intermediate" form of scrutiny, because government prohibitions on intentional lies are not as harmful as other kinds of content-based distinctions. *Id.* at 2551–52. He concludes that "the statute risks harming protected interests but only in order to achieve a substantial countervailing objective," and thus turns to the question whether less burdensome means are available, and concludes that the government had not met its burden of showing that such alternatives were not available. Whether his standard of "substantially" achieving the government's objective is intended to convey that the alternative is "equally" effective remains unclear. *See id.* at 2556 (stating that "it is likely that [alternatives] will effectively serve Congress' end"). Justice Breyer's opinion can perhaps be best understood through the lens of the burden of persuasion, a burden he found the government did not meet.

<sup>223.</sup> Cf. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, ¶ 149 (Can.) (Abella, J., dissenting) ("It is possible . . . to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional."). Justice Abella's comment, which I do not read to suggest a departure from Canada's structured sequence of questions, is intriguing. Although under conventional applications of structured proportionality doctrine use of a means that is broader than necessary would end analysis, to invalidate a statute on this ground, where the statute is otherwise proportional, might even be considered excessive in light of the problems of legislative inertia. That is, even if a legislature would favor enactment of a more narrowly drawn law to replace one too broadly drawn, this may not occur—especially in a separated powers system—because other matters crowd the legislative agenda, or because of conflicts between legislature and government. A more relaxed approach to "minimal impairment" where the intrusion on rights is relatively small and the benefit to a very important government goal is significant might be, in a sense, more proportionate than invalidating the law, once the risks of legislative inertia are considered.

### C. Theoretical Benefits of Proportionality Review in Deciding Rights Claims

This Part will now identify at a more general level several benefits to be derived from judges applying proportionality doctrine or principles in evaluating rights claims. First, experience elsewhere suggests that structured proportionality review provides a stable framework for persuasive reason-giving, thereby enhancing the transparency of decisions, unlike more opaque forms of balancing.<sup>224</sup> Second, proportionality analysis helps to bridge the roles of courts and legislatures. It requires legal authorization for infringement of rights; it also identifies criteria—to which legislatures are competent to speak—that form part of the justificatory process. Third, reliance on proportionality principles can help bring law closer to the community’s sense of justice, in part by cultivating the art of judgment by judges and lawyers. Fourth, attention to proportionality can help identify, and respond to, process deficiencies in governance.

#### 1. Structured and Transparent Reason-Giving with Broad Justificatory Appeal

Proportionality analysis in Canada and some other jurisdictions provides a structured and transparent mode of reason-giving that produces justifications likely to be meaningful, or at least understandable, to the parties and other audiences for constitutional courts’ decisions. The sequencing and defined order of proportionality review of constitutional rights claims in Canada has provided a more or less stable doctrinal framework within which disagreements are conducted.<sup>225</sup> It also contributes to the relative accessibility and transparency of the Court’s reasoning. The stability of the methodology, and its widespread acceptance, enables the Canadian justices’ disagreements to focus on matters that are understandable by the parties as substantively relevant to the contested issue; such opinions also make accessible to readers the nature of the justices’ disagreement, and the divergent evaluations they may give to the same factors.<sup>226</sup> The sequencing of analysis may be contrasted with more “free form”

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<sup>224</sup>. See Aleinikoff, *supra* note 15, at 976 (discussing the “black box” of balancing).

<sup>225</sup>. See, e.g., Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 830-32 (2004) (book review); Stone Sweet & Mathews, *supra* note 37, at 90 (“[Proportionality analysis] clearly indicates to litigating parties the type and sequence of arguments that can and must be made, and the path through which the judges will reason to their decision.”).

<sup>226</sup>. See Jackson, *supra* note 225, at 831; Stone Sweet & Mathews, *supra* note 37, at 96-97. This structured analysis may also have the beneficial effect of encouraging judges to articulate the actual reasons for their opinions. See Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 22-23 (1988) (emphasizing the importance of “real reasons” that “reflect the thought processes of the writer and of those colleagues joining in the opin-

evaluations in well-known U.S. balancing cases.<sup>227</sup> In the United States, however, different Justices may well continue to deploy different methodologies, and so some of the structured transparency and consistency gains of a Canadian-style approach might not be realized.

In addition to its benefits in structuring and making more transparent the reasoning of the different justices, proportionality review—by embracing a wider range of reasons than those that resort to text, precedent, and history alone—may increase the persuasive value of the decisions to both the parties<sup>228</sup> and the broader public. As Cass Sunstein has written, “[i]n American constitutional law, government must always have a reason for what it does.”<sup>229</sup> Frank Michelman’s work emphasizes the connection between government reason-giving and equality of persons.<sup>230</sup> Authority to act is not the same as a reason to act; authority alone does not meet demands for reasons. Furthermore, varying

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ion”). More speculatively, the sequence of questions in structured proportionality may have a “de-biasing” effect: judges whose instinct is that a challenged law is unconstitutional still have to address its “suitability”—that is, whether it advances the government’s objective at all, a question that will typically be answered in the affirmative. Judges whose instinct is that a regulation is justified even if it infringes on an area of rights have to pause to consider, at the minimal impairment step, whether there are less intrusive means that serve government goals equally well. By unpacking the analytical elements more than U.S. strict scrutiny, this approach in theory yields more complete consideration of competing points of view.

<sup>227</sup>. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Dennis v. United States*, 341 U.S. 494 (1951); see also *Coffin*, *supra* note 226, at 29–30 (criticizing cases in which there is no “illuminating responsive discussion” in the majority and dissenting opinions).

<sup>228</sup>. On the role of judicial judgments in persuading losers that their loss was legitimate, see, for example, *Flannery v. Halifax Estate Agencies Ltd.*, [1999] 1 W.L.R. 377 (Eng.) (linking “duty to give reasons” to “fairness . . . to the parties—especially the losing party,” who “should be left in no doubt why they have won or lost”); *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, ¶ 60 (Can.) (explaining that “where hard choices have to be made, [reasons] may provide a modicum of comfort, especially to the losing party, that the process operated fairly” (citation omitted)); cf. Vlad Perju, *Proportionality and Freedom—An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334 (2012) (arguing that the multiple, careful steps of proportionality analysis help promote a sense of procedural justice in losers, who can see that their arguments were taken seriously). Indeed, it might even be argued, case-by-case proportionality analysis offers hope to “losers” that, in a different context, their claim might “win.”

<sup>229</sup>. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17 (1993).

<sup>230</sup>. See Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 75–76 (1986) (discussing freedom as “self-direction by norms cognizant of fellowship with equally self-directing others” and stating that “[e]very norm, every time, requires explanation and justification in context . . . [, a task calling] for practical reason, and . . . involv[ing] dialogue”); see also Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 28–29 (2001) (emphasizing the importance of giving reasons that “respect our humanity . . . [and] attend to the range of reasons . . . we care about”); text accompanying notes 70–71.

reasons may appeal to different audiences.<sup>231</sup> Even in the formulation of categorical rules, as in *Atwater*, the Court typically invokes at least some consequentialist understanding—there, of the need to allow unimpeded law enforcement. Notwithstanding the sometimes-expressed view that proportionality involves only arbitrary evaluations,<sup>232</sup> there is nothing “non-legal” about efforts to promote the proportionality of government action by considering its effects on relevant constitutional values.<sup>233</sup>

## 2. Bridge Between Courts and Legislatures

A second benefit of structured proportionality analysis is that it can provide a bridge between decision making in courts and decision making by the people, legislatures, and public officials. Proportionality doctrine arguably invites more participatory deliberation over constitutional rights, and it may achieve more compliance by legislatures and other officers with constitutional values by offering a rubric for decision making that is accessible to those other decision makers.<sup>234</sup>

Preliminary inquiries into whether challenged action has been authorized by law and has a proper purpose can be seen not simply as judicial checks on government action but as opportunities for the legislature to reflect on and improve its own legislative product. Insisting on proper purpose and legal authority focuses attention on the central role of legislatures in authorizing, and

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<sup>231.</sup> Cf. Michelman, *supra* note 230, at 30-34 (describing certain balancing tests as a commitment to “a communicative practice of open and intelligible reason-giving”).

<sup>232.</sup> See, e.g., William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 73 (1997).

<sup>233.</sup> See also *infra* notes 251-258 and accompanying text (discussing “constitutional judgment”). As leading constitutional scholars recognize, legitimate sources in constitutional law include multiple forms of argumentation—including “ethos” and “prudential” forms of argument, concerned with values and consequences. See PHILLIP BOBBITT, CONSTITUTIONAL FATE—THEORY OF THE CONSTITUTION (1982); PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (describing and exploring several forms of interpreting the Constitution); see also Robert Post, *Theories of Constitutional Interpretation*, in LAW AND THE ORDER OF CULTURE 13-41 (Robert Post ed., 1991) (describing doctrinal, historical, and responsive interpretation); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (describing how different modes of interpretation work together).

<sup>234.</sup> But cf. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (“[R]ational basis’ is not just the standard of scrutiny, but the very substance of the constitutional guarantee.”); H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217 (2011) (criticizing the Court’s equating “rational basis” as a standard of review with the substance of the constitutional guarantee).

limiting, government conduct that affects rights.<sup>235</sup> Assuming authority and proper purpose, legislative decision making may also take into account and thereby influence courts' determinations of whether the proportionate means tests have been met. Proportionality doctrine can thus be seen as a reflection of the dual commitments of constitutional democracies – to the protection of rights and to democratic self-governance, which itself can be conceived of as a right.<sup>236</sup>

Moreover, in situations of epistemic or normative uncertainty, legislatures may be more empirically competent and democratically legitimate than courts in making prognostic factual determinations and in making accommodations among competing values.<sup>237</sup> As Robert Alexy put it, when judgments about “suitability” (rationality) or “necessity” (analogous to minimal impairment) are in a zone of “epistemic uncertainty,” the fact that the legislature is democratically elected is a reason to accept its determination of these issues.<sup>238</sup> When there is epistemic uncertainty – for example, whether decriminalizing marijuana would be as effective as criminalization in preventing dangers associated with that drug’s trade and use – legislative judgments about the necessity of the criminal prohibition prevail.<sup>239</sup> When there is a “normative” stalemate –

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<sup>235.</sup> See also Weinrib, *Constitutional Comparativism*, *supra* note 138, at 17 (arguing that the requirement that limitations be “prescribed by law” means that encroachment on rights must be “authorized . . . through the regular channels of law-making, so that it is the product of a representative, accountable, deliberative public process” while acknowledging that the “principled elaboration of the common law also satisfies” the formal standard); cf. Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 259, 260–61 (Grant Huscroft et al. eds., 2014) (advancing a “broadly-gauged conception and defense of a proportionality-like test for limiting rights” that “seeks to accommodate and temper enduring and legitimate democratic concerns.”). For an argument that legislatures constitute rights by deciding on their limitations, see GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION (2012).

<sup>236.</sup> Stephen Gardbaum has argued that proportionality review can be understood to enhance, rather than to constrain, democracy. See generally Gardbaum, *supra* note 235. Gardbaum’s suggestion is that proportionality review is democracy enhancing insofar as it is understood to allow democratic legislatures to limit rights. My argument is slightly different: that proportionality review may be democracy enhancing and rights enhancing at once, insofar as it engages legislatures in understanding and protecting rights in the legislative process.

<sup>237.</sup> Some courts have, for example, indicated that legislatures have considerable discretion on the rationality of means, contemplating judicial non-acceptance of the legislature’s presumed finding of rationality only rarely, as in cases of corruption. See, e.g., BARAK, *supra* note 22, at 311 (discussing the Gaza Coast Regional council case); see also *id.* at 312 (“[T]he legislator’s discretion in determining its legislative prognosis is wide.”) For Barak, legislators make choices within a “zone of proportionality,” while courts police that legislative choices remain within that zone. *Id.* at 397–411.

<sup>238.</sup> ALEXY, *supra* note 19, at 399–401, 411–18.

<sup>239.</sup> *Id.* at 399–400. But cf. R. v. Oakes, [1986] 1 S.C.R. 103, 136–37 (placing the “onus” of justification on the party seeking to uphold the limitation).

involving, for example, competing principles worthy of optimization as in the protection of workers' rights and those of small employers in lay-off situations—legislatures have normative discretion to make different choices.<sup>240</sup> And, in theory, the sequenced structure of proportionality doctrine allows for judicial deference to legislative resolution of some questions, such as minimal impairment, even if not on all questions.

One of Laurence Tribe's critiques of John Hart Ely's representation-reinforcement theory of judicial review was that Ely's theory offered no guidance on constitutional meaning to legislators or executive branch actors.<sup>241</sup> By contrast, the questions of proportionality analysis resonate with the competences of legislatures, especially in its inquiries about rational relation and minimal impairment, both of which have "predictive" factual components about the connection between the means chosen and the legislative goal.<sup>242</sup> Legislators who understand that statutes will be evaluated under proportionality standards if challenged as infringing on individual constitutional rights will have reason to give attention to the rationality of the means, to whether there are other means less likely to intrude on rights, and to whether the gains to be achieved are weightier and of such a character as to warrant intrusions on protected freedoms.<sup>243</sup> As Mattias Kumm has written, focusing public actors on the elements of proportionality review can have a

disciplining effect on public authorities and help[] foster an attitude of civilian confidence among citizens. The legal institutionalization of Socratic contestation helps keep alive the idea that acts by public authorities that impose burdens on individuals must be understandable as rea-

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<sup>240.</sup> ALEXY, *supra* note 19, at 415-416. Alexy thus disagrees with the suggestion that German proportionality analysis contemplates a single, perfect, ideal answer to rights questions. Cf. BOMHOFF, *supra* note 2, at 103-19 (describing the German theory of constitutional legal perfectionism).

<sup>241.</sup> See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1079-80 (1980).

<sup>242.</sup> ALEXY, *supra* note 19, at 399 (noting "difficult problems of prognosis" posed by "suitability" and "necessity" inquiries); cf. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 101-04 (1995) (arguing that "[t]he language of post-Charter laws . . . suggests that Canadian legislators are engaging in a self-conscious dialogue with the judiciary").

<sup>243.</sup> In a rights-valuing legal culture, legislators may have political incentives to be careful of protecting rights, particularly on legislation that is of high public salience. For related discussion, see JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 86 (1999) (discussing the legislator's role as "judging" what is just, or in accord with society's conception of natural law); WEBBER, *supra* note 235, at 149-59 (arguing that "[f]or a legislator, the ground for a political decision should always be its justification in a free and democratic society" and that legislators must be guided by standards of public reason).

sonable collective judgments about what justice and good policy requires to be legitimate.<sup>244</sup>

Proportionality considered in courts and in legislatures may differ: legislatures can focus on finding the best achievable solutions; “proportionality analysis” by courts can serve as a check against serious disproportionalities.<sup>245</sup> For courts, the sequenced structure of proportionality doctrine offers benefits of consistency and transparency in methodology; but for both legislatures and courts, there are benefits from considering proportionality, even in less structured ways, as a principle of justice.

### 3. Justice, Law, and Judgment

Proportionality as principle or doctrine is a way to bring the demands of justice into greater harmony with the law of constitutional rights.<sup>246</sup> Justice is not synonymous with law; it provides a critical platform from which to evaluate law. There is value in a legal system’s aspiring to do justice, as understood in its society. Attention to different factual contexts, as well as the need to confront the impact of general rules on particular cases in terms of proportionality, can help hone a juridical and political community’s sense of justice.<sup>247</sup>

Legal systems whose decisions do not resonate with widely held conceptions of justice may not be able over the long run to perform their basic functions. Such decisions undermine respect for law and for the legitimacy of courts. In the context of Fourth Amendment law, scholars have observed that

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<sup>244</sup>. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 141, 163 (2010).

<sup>245</sup>. See SULLIVAN & FRASE, *supra* note 52, at 8 (suggesting that the “balancing” metaphor implies an optimum point, whereas proportionality review focuses on whether action is disproportionate, recognizing legislatures and executive officials as the “primary decisionmakers”). But cf. Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 195-206 (2006) (distinguishing “optimizing” from “state-limiting” uses of proportionality and arguing that “optimizing” facilitates “orderly” approaches to deference, which either approach entails).

<sup>246</sup>. For a defense of proportionality review’s ability to bring constitutional rights in line with justice, see Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574 (2004) (reviewing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002)). On the relationship of rights to justice, see also Webber, *supra* note 136, at 126-29.

<sup>247</sup>. Kumm, *supra* note 244, at 147 (proportionality review is “the means by which values are related to possibilities of the normative and factual world”). One of the intended benefits of the independent Article III courts was to “mitigate[e]” and “moderate” legislation that is “unjust” or “partial.” See THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that independent courts would serve these functions both in applying laws that are enacted and in providing a check on future inequitable legislation).

the Court has tended to reject categorical rules and apply totality of the circumstances tests where the proposed categorical rule would benefit those who are the subjects of police searches, and to embrace categorical rules where they are permissive of police behavior.<sup>248</sup> This pattern, together with the exclusion of officers' intent (or pretext) and of state or local law in defining what is reasonable,<sup>249</sup> cannot but tend to contribute to the lack of trust in police now prevalent in many minority communities. In this area, moving towards doctrine that permits a fuller range of the factors that people in ordinary life consider reasonable would help re-establish the law's connection to justice. To be sure, constitutional justice will often be contested. Even so, proportionality doctrine helps clarify the grounds for decision and the relative importance of different components of justice, thereby providing a framework of analysis for resolving what is most importantly at stake.<sup>250</sup>

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<sup>248.</sup> See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITTS. L. REV. 227, 242 (1984) ("[M]ost of the Supreme Court's current bright line rules tell police officers, 'Yes, you may search,' rather than 'No, you may not.'"); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 295-98, 308 (contrasting the Court's rejection of a bright-line "first-tell-then-ask" rule, designed to moderate police pressure on suspects to consent to searches, with "a pronounced pattern of ruling in favor of the government" in Fourth Amendment cases).

<sup>249.</sup> See, e.g., *Virginia v. Moore*, 553 U.S. 164, 168-73 (2008) (treating police officers' violation of a state law authorizing only a citation, and not an arrest, as irrelevant to petitioner's Fourth Amendment challenge to the reasonableness of a search incident to that arrest, and concluding more generally that the Fourth Amendment was not understood to include constraints of subsequently enacted statutes); *Whren v. United States*, 517 U.S. 806, 815-16 (1996) (rejecting the argument that "insistence upon police adherence to standard practices [is] an objective means of rooting out pretext" and seemingly treating as irrelevant whether officers complied with local practices (there, embodied in a regulation) that vary from place to place, because Fourth Amendment law cannot "be made to turn upon such trivialities").

<sup>250.</sup> See Jackson, *supra* note 79, at 613-19. Because justice, and the relative weight of different constitutional values is contestable, application of proportionality analysis will sometimes yield different conclusions even in the same system, in ways that structured proportionality analysis can help make more transparent. See *infra* notes 449-451 and accompanying text (discussing the majority and dissenting opinions in the Canadian *Keegstra* case concerning hate speech). Compare *Roe v. Wade*, 410 U.S. 113 (1973) (applying "strict scrutiny" to establish a trimester approach to abortion regulation), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (rejecting the trimester approach and establishing an "undue burden" test for the constitutionality of regulations designed to protect fetal life before viability). Looking transnationally at abortion regulation, a range of approaches arguably meets the requirements of proportionality in different national settings. Where a court comes down depends in important part on the substantive constitutional values of its jurisdiction, including whether the jurisdiction recognizes a fetal right to life protected by the constitution, as neither Canada, see *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.), nor the United States does. But in any system respecting women's equality, application of proportionality analysis will impose constraints on whether and how aggressively abortions can be prohibited. See generally VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1-158, 210, 219-21 (3d ed. 2014) (describing decisions in United States, Germa-

A related advantage of proportionality is the opportunities it provides for the development of what we might call constitutional judgment or “situation sense.”<sup>251</sup> Mark Tushnet has argued that Justice Breyer’s dissent in *Heller* should not be understood as primarily about proportionality or balancing, notwithstanding its use of “proportionality” language; rather, it should be understood as about the application of legal judgment to complex settings.<sup>252</sup> Tushnet has also argued that the Court’s First Amendment decisions in such cases as *Snyder v. Phelps*,<sup>253</sup> *United States v. Stevens*,<sup>254</sup> and *Sorrell v. IMS Health Inc.*,<sup>255</sup> represent a form of “judicial pathology,” consisting of overestimating the harms that prohibitions on speech would cause and an insensitivity to the distribution of those harms.<sup>256</sup> This pathology, Tushnet suggests, is connected to the “rule-ification” of the area and a related “fear” of making obvious judgment calls on issues of degree.<sup>257</sup> Once a “rule” is announced, its function is to focus judicial attention only on the “rule” (that is, for example, asking whether a regulation is “content-based”), rather than on the purposes of the constitutional provision the rule is intended to implement. The arguments for “rule-ification” are stronger with respect to multiple decision makers, like lower court judges and executive officials, than with respect to the Supreme Court, which can always consider introducing an “exception” to a rule. In recent free speech cases, however, the Court has arguably deprived itself of the opportunity to engage with the purposes behind the presumptive rule against content-

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ny, Canada, Colombia, and the European Court of Human Rights, and noting that permissible restrictions under European case law may depend in part on the available social resources for medical and other services, as well as the ease of travel). Proportionality’s emphasis on a clear understanding of what rights are at stake and on the *justification* for restrictions enables both proponents and opponents of abortion regulation to make their claims to legislatures in understandable terms and allows courts to consider arguments challenging legislation in terms that connect both to constitutional values and lived experiences.

<sup>251.</sup> See JACKSON, *supra* note 118, at 151-52 (discussing the “acquisition of a sense of legal judgment,” Karl Llewellyn’s idea of “situation sense,” and good judgment, all in the context of constitutional law); *see also* Mark Tushnet, *Heller and the Critique of Judgment*, 2008 SUP. CT. REV. 61 [hereinafter Tushnet, *Heller and the Critique of Judgment*]; Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103 (2012) [hereinafter Tushnet, *The First Amendment*].

<sup>252.</sup> Tushnet, *Heller and the Critique of Judgment*, *supra* note 251, at 71, 76-84.

<sup>253.</sup> 562 U.S. 443 (2011).

<sup>254.</sup> 559 U.S. 460 (2010).

<sup>255.</sup> 131 S. Ct. 2653 (2011).

<sup>256.</sup> Tushnet, *The First Amendment*, *supra* note 251, at 105-06.

<sup>257.</sup> *Id.*; *see also* Sullivan, *supra* note 16, at 68 (discussing some of the pathologies associated with “adjudication-by-rule”).

based regulation, reaching results that may well be inconsistent with the long-term constitutional judgments of the people.<sup>258</sup>

The Court in *Stevens*, for example, rejected the government's argument for a "categorical balancing of the value of the speech against its societal cost," denying that the Court has "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."<sup>259</sup> Consider instead if the question had been whether the statute met a multi-part proportionality standard like that used in Canada. Presumably the Court would have found that it did not, because the statute was so "overbroad" it would have failed "minimal impairment." But the Court would also have had to address such questions as whether the government's purpose in reducing animal cruelty was legitimate and of sufficient importance to warrant some limitation of expressive activity, and whether prohibiting the commercial development and distribution of videos featuring animal cruelty was a rational means of achieving that purpose.<sup>260</sup> The guidance provided by analysis of these questions might have assisted subsequent legislative efforts to address the problem through more narrowly tailored legislation.<sup>261</sup> Proportionality analysis, in short, could help promote judi-

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<sup>258.</sup> See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2732 (2011) (invalidating a state law prohibiting the sale of violent video games to children under eighteen); *Stevens*, 559 U.S. at 469 (rejecting the possibility of a categorical exception from First Amendment protection for at least some depictions of animal cruelty). *But see Entm't Merchs.*, 131 S. Ct. at 2766 (Breyer, J., dissenting) (indicating that in applying strict scrutiny, he "would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying 'compelling interests,' the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, 'the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide'" (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 841 (2000))).

<sup>259.</sup> *Stevens*, 559 U.S. at 470 (quoting Brief for Petitioner at 8, *Stevens*, 559 U.S. 460 (No. 08-769)); *id.* at 472 (striking down a law prohibiting the commercial creation, sale, or possession of certain depictions of animal cruelty). Concluding that the law did not fall within the "historic and traditional categories" of permissible speech restrictions, *see id.* at 468 (citation omitted), and after rejecting the government's argument for a blunt balancing test to identify new areas of permissible regulation, the Court applied its "existing doctrine," *id.* at 472, and found the statute unconstitutional for overbreadth. It went immediately to overbreadth analysis without considering, for example, the statute's purposes, or the rationality of its means. *See infra* note 260.

<sup>260.</sup> Only Justice Alito's lone dissent in *Stevens* addressed the law's purpose, its connection to that purpose, and whether the harm suppressed warranted intrusion on speech interests. *See* 559 U.S. at 491-99 (Alito, J., dissenting) (discussing the "compelling governmental interests" served by the law); *cf.* Brief for a Grp. of Am. Law Professors in Support of Neither Party, *Stevens*, 559 U.S. 460 (No. 08-769) (urging the Court to reject the Third Circuit's conclusion that prevention of animal cruelty was not a "compelling government interest").

<sup>261.</sup> Congress indeed responded to *Stevens* by quickly enacting legislation prohibiting "animal crush videos" with elements of "obscenity," and including explicit exceptions for depictions

cial engagement with basic questions of constitutional justice, reflected in judgments about legitimate or compelling purpose—and its relationship to the harms from limiting expressive activity presumptively protected by the First Amendment.

#### *4. Process Failures Warranting Heightened Scrutiny*

A different kind of argument arises from considering whether disproportionalities in the effects of government action may be a signal of failures in the legislative process that warrant increased scrutiny by the courts.<sup>262</sup> On John Hart Ely's theory, process failures resulting from conscious prejudice and intentional discrimination against minority groups warrant higher levels of justification and judicial scrutiny.<sup>263</sup> A wider range of process failures might be signaled by disproportionalities in the application of law. Disproportionalities—such as those that occur when a law is more intrusive than necessary to serve the stated purposes—may signal an underlying problem, relating not only to conscious prejudice but also to failures of equal regard. Some may arise from lawmakers' insufficient concern with disproportionate effects on the relatively powerless; some may reflect unconscious or unarticulated prejudices; some may arise from the simple inability to anticipate legislation's effects. Each of these might be understood as a process failure: a failure, in Justice John Paul Stevens's terms, to fulfill the government's duty of impartiality to the peo-

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of hunting and the slaughter of animals for food. *See* Pub. L. No. 111-294, § 3(a), 124 Stat. 3178 (2010). The reference to “obscenity” was an evident effort to come within an established “categorical” exception for obscenity. *See* *Miller v. California*, 413 U.S. 15 (1973). At least one constitutional challenge to the new statute, accepted by the District Court, was rejected by the Fifth Circuit. *See* *United States v. Richards*, 940 F. Supp. 2d 548 (S.D. Tex. 2013), *rev'd*, 755 F.3d 269 (5th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3742, 2015 WL 1280267 (Mar. 23 2015).

<sup>262</sup>. *See* Jackson, *supra* note 225, at 830 n.82 (“[Proportionality] can be used to help screen legislation for purposes that are deemed impermissible on other grounds.”).

<sup>263</sup>. *See* ELY, *supra* note 122, at 102–04. For critique of political process theory as the basis for judicial review as “radically indeterminate and fundamentally incomplete,” see Tribe, *supra* note 241, at 1064. Such objections do not, in my view, apply to considering the disproportionate effects of laws as a signal of the kind of possible process failure that may conflict with more substantive constitutional commitments.

ple.<sup>264</sup> Some such process failures may warrant heightened judicial attention or intervention.<sup>265</sup>

In the United States, the tiered structure of review applicable to rights claims under equal protection and due process already embodies to a certain extent the idea of proportionality, because more is required to justify laws in categories deemed likely to be of greater constitutional concern; so, too, does the role of less intrusive alternatives in areas of U.S. doctrine.<sup>266</sup> There can be a large gap between “strict scrutiny” and “rational basis” review, however, seen in the contrasting treatment of overt racial classifications and neutral laws with a disparate impact based on race. The principle of proportionality supports Justice Thurgood Marshall’s suggestion that whether a classification violates equal protection should depend not on rigid *ex ante* categories but on a more flexible, more proportionate approach,<sup>267</sup> as will be discussed further in Part V below.

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<sup>264</sup>. Justice Stevens has articulated a “duty to govern impartially” in several opinions. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting); *Harris v. McRae*, 448 U.S. 297, 357 (1980) (Stevens, J., dissenting); see also Jeremy Waldron, *Principles of Legislation*, in THE LEAST EXAMINED BRANCH, *supra* note 30, at 21 (discussing the importance of impartiality and justice in legislation).

<sup>265</sup>. As discussed further in Part V, disproportionate applications are a necessary feature of prophylactic rules; but if there is a good enough reason for having such a rule, some disproportionalities must be accepted or its prophylactic goals would be undermined. Interests arguably within the scope of rights may be *underprotected* by prophylactic rules designed, for example, to prevent mistaken judicial interference with legislation in arenas in which past judicial interventions were regarded as erroneous intrusions on democratic decision making based on a mistaken understanding of rights. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (signaling that the Court would henceforth uphold “regulatory legislation affecting ordinary commercial transactions” unless the facts are such “as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators”). Other interests only arguably within the scope of rights may be *overprotected* to avoid errors of underprotection; freedom of speech is an area in which prophylactic categorical presumptions may be warranted. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) (emphasizing the importance of “confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense”); cf. Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1264, 1279-87 (2014) (arguing that the doctrine of content-neutrality is most important in preventing petty village tyrants from acting against idiosyncratic voices).

<sup>266</sup>. See, e.g., SULLIVAN & FRASE, *supra* note 52, at 53-66 (describing “implicit proportionality principles” in the standards of review used in equal protection, substantive due process, First Amendment, and dormant commerce clause cases).

<sup>267</sup>. *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (emphasizing “the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification”). Although I hold a Chair presently named af-

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Some of these benefits relate primarily to use of the structured proportionality doctrine of Canada and similar systems. But others—bringing law closer to justice—derive from greater use of proportionality principles even in differently or less structured contexts.<sup>268</sup>

#### IV. OBJECTIONS AND RESPONSES

Some objections to proportionality as a standard for review would apply, generally, in any constitutional democracy. These objections—including to its indeterminacy, its asserted intrusiveness, its potential for inconsistent applications, its asserted irrationality, and its claimed incompatibility with strong conceptions of rights—are discussed in Part A. Other concerns about proportionality relate to particular aspects of U.S. constitutional law and culture; these are addressed in Part B.

##### A. General Objections to Proportionality as a Standard of Review

Although structured proportionality review’s responsiveness to legitimate government justification could help to protect rights while maintaining effective self-government, some argue that this very flexibility detracts from its quality as law, creating an unacceptable level of indeterminacy.<sup>269</sup> The weight to give the indeterminacy critique depends to an important degree on what proportionality review would replace. It is one thing if it replaces a seemingly determinate categorical test;<sup>270</sup> but if proportionality doctrine replaces a less structured “all things considered” approach, or an exception-riddled set of cat-

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ter Justice Marshall and served as his law clerk in October Term 1977, my appreciation for his views came most fully into focus after I had studied comparative constitutional law.

<sup>268</sup>. Cf. SULLIVAN & FRASE, *supra* note 52, at 6–7 (suggesting that there are three distinct tests of proportionality—“limiting retributive” proportionality that constrains liability and sanctions, “alternative-means” proportionality testing whether less intrusive means exist, and “ends-benefits” proportionality, which “compar[es] a single measure to its expected benefits”). They argue that “every government intrusion into individual autonomy [should] undergo some form of proportionality review unless strict scrutiny or another more restrictive standard applies.” *Id.* at 11.

<sup>269</sup>. See, e.g., WEBBER, *supra* note 235, at 89–115; Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 470–72 (2009).

<sup>270</sup>. Such a change might still improve the overall quality of decisions; whether a more flexible proportionality standard would be better than a particular categorical rule depends on the quality of decisions produced under each.

egorical rules, it might produce a more disciplined jurisprudence. And structured proportionality can co-exist with understandings of rights as “principles” requiring optimization,<sup>271</sup> or as “shields,” requiring legitimate and strong reasons to interfere.<sup>272</sup>

Another argument is that proportionality review is too intrusive on legislatures, establishing a standard that cannot realistically be met.<sup>273</sup> A version of this argument, which Alexy refers to as the “highest point thesis,” contemplating single right answers,<sup>274</sup> is inconsistent with the recognition by leading proponents of proportionality of the existence of significant “zones” of legislative “discretion,”<sup>275</sup> in which the legislature’s judgment will control. It is moreover inconsistent with widespread recognition that proportionality review, with its sequenced steps, is capable of being applied with “variable intensity.”<sup>276</sup> The related claim that “proportionality,” like balancing, is more a legislative than a judicial competence<sup>277</sup> ignores the degree to which while legislatures and executives may have particular knowledge and competence about, for example, the scope of national security risks and the best means to minimize those risks, courts have more capacity fairly to decide questions of individual rights.<sup>278</sup>

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<sup>271.</sup> See *supra* note 37 (noting Robert Alexy’s views).

<sup>272.</sup> See, e.g., Schauer, *supra* note 36, at 429-31.

<sup>273.</sup> See, e.g., Choudhry, *supra* note 116, at 504 (arguing that the pitfall of proportionality analysis is that it does not respond to the “general problem of how to fashion judicial review in a rights-protecting democracy where governments often legislate with imperfect information”).

<sup>274.</sup> ALEXY, *supra* note 19, at 396-97. On “one right answer” conceptions of proportionality, see Rivers, *supra* note 245, at 192-93. See also *supra* note 237.

<sup>275.</sup> See ALEXY, *supra* note 19, at 396-415 (discussing the German Federal Constitutional Court’s cannabis judgment); MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 114-15 (2012) (discussing the cannabis judgment, in which the degree of interference with individual freedom was clear but there was considerable empirical uncertainty over the health effects of cannabis use, and establishing a zone in which the legislature’s decision would not be disturbed); BARAK, *supra* note 22, at 379, 384 (discussing the “zone of proportionality” and legislative “discretion” to choose among proportional alternatives); see also Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court, Second Senate] Mar. 9, 1994, ENTScheidungen des BUNDESVERFASSUNGSGERICHTS [BVerfGE] 90, 145 (Ger.), translated in *Decisions of the Federal Constitutional Court*, GERMAN L. ARCHIVE 173 (Michael Jewell trans., 2001) <http://www.iuscomp.org/gla/judgments/bverfg/v940309.htm> [<http://perma.cc/PB4J-3DKH>] (stating that in choosing suitable, and necessary means, “the legislator has a certain degree of discretion”).

<sup>276.</sup> See Rivers, *supra* note 245, at 202-06.

<sup>277.</sup> See Aleinikoff, *supra* note 15, at 981-86.

<sup>278.</sup> On some reasons for special judicial competence on questions of justice, morality and constitutional rights, see, for example, CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3, 52-64 (2001); and LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 72-76, 199-201 (2004). It bears noting that the task of a reviewing court may be conceptualized not

There are, to be sure, institutional concerns with using “standards” like proportionality, rather than “rules.” Non-judicial actors, like police, may find it easier to implement a rule than a standard.<sup>279</sup> Rules, however, can lose their ease and clarity as their exceptions proliferate.<sup>280</sup> Even if “categorical” rules would result in fewer errors, moreover, a standard may result in fewer “serious” errors, or departures from a common sense of constitutional justice, than its “categorical” counterpart.<sup>281</sup>

To the extent proportionality analysis allows courts to consider more factors, however, the range of reasonable applications may be broader, which may result in more consistency problems in lower courts in the decentralized system of U.S. judicial review.<sup>282</sup> Recent experience with categorical rules in the United States suggests that neither determinacy nor respect for legislative outcomes is necessarily protected through such rules.<sup>283</sup> Moreover, the U.S. Supreme

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as making the primary determination of the proportionality questions, but as reviewing whether a reasonable government could have reached the conclusion it did, possibly with varying degrees of deference depending on the issue. *See, e.g.*, Gardbaum, *supra* note 34, at 102 (“[R]eviewing courts should ask whether a legislature’s assessment that the chosen means [meet the suitability, necessity and proportionality as such tests] is a reasonable one. . . . [T]he issues involved tend to be relatively indeterminate in the sense that there is usually no one right answer but (a) a range of reasonable ones and (b) one or more wrong or unreasonable ones. Particularly in this context, the task of judicial review should be limited to weeding out the latter.”); *id.* at 89 (arguing for more deference to legislatures than to executive decision makers); *see also* AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 240 (2009) (arguing that courts should not assess proportionality as if they were the primary decision maker but as a “secondary” decision maker, owing some deference to Parliament); de Búrca, *supra* note 1, 147–48 (summarizing approaches to deference); Rivers, *supra* note 245, at 205–06 (suggesting that the intensity of proportionality review should depend on the severity of the rights infringement).

<sup>279.</sup> See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

<sup>280.</sup> See Alschuler, *supra* note 248, at 287 (1984) (arguing that Fourth Amendment law is incomprehensible because there are too many detailed rules).

<sup>281.</sup> I thank the Harvard Law students in my seminar on Proportionality as a Transnational Principle, Spring 2013, for helping to crystallize this idea.

<sup>282.</sup> See Scalia, *supra* note 16, at 1178–83 (favoring “clear, general principle[s] of decision” to promote “predictability”); Sullivan, *supra* note 16, at 62–66 (discussing why rules may help promote consistency and predictability). While there is an important interest in consistency, whether the results of such uniformity are positive overall depends in part on the quality of the rule articulated and how the results under that rule differ from the results under a differently worded standard. Not every rule is superior.

<sup>283.</sup> For cases that created new exceptions or produced unexpected results under “categorical” rules, see, for example, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which arguably abandons truly strict scrutiny in evaluating limitations on speech in the national security context; and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which creates an exception to the exception from the ban on content-regulation for “fighting words.” For a critique of the claim that categorical rules in the Fourth Amendment context are helpful and constraining guides to the police, see Alschuler, *supra* note 248, at 231, which argues that courts produce

Court's "shrunken docket"<sup>284</sup> suggests that it has substantial unused capacity to control errors and promote consistency in the lower courts: the Court's docket remains roughly half of what it was decades ago.<sup>285</sup> The Court may be able to expand its docket and use some of that capacity to minimize inconsistencies in the lower courts' application of proportionality.

The "proportionality as such" element of proportionality review has been most widely subject to critique, as unconstrained "balancing" of often incomensurable values and based only on the preferences of the judges.<sup>286</sup> Indeed, some, including Jürgen Habermas, view the "proportionality as such" test as essentially irrational because it requires the weighing of incommensurables lacking a common metric.<sup>287</sup> Even absent a common metric, however, judg-

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"an unmanageable multiplicity of rules" that cannot be humanly remembered, that present numerous choices regarding which rule is applicable, and whose artificiality begets more rules that "muddy more than they clarify" and depart from both justice and predictability.

<sup>284</sup>. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 493 (1996). Hellman suggested that the declining docket of granted cases resulted in part from the views of recent Justices that error correction is not a significant task, reflecting a vision of an "Olympian Court" concerned only with deciding large questions. *Id.* at 432-38. He also noted possible disadvantages from the smaller docket, including the Court's failing to "engage in the process of developing the law through a succession of cases in the common-law tradition," "creating gaps in the law," "impair[ing] the quality of the Court's work in the cases that it does take" by depriving itself of the knowledge of how a particular issue "fits into its larger setting," and fostering "detachment from the work of lower courts," noting, as an example, the decision in *Whren v. United States*, 517 U.S. 806 (1996). *Id.* at 433-36. *Whren* is discussed *supra* notes 161, 249, and *infra* note 325. For a somewhat different perspective on the same phenomenon, see Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 63-96 (1999) (arguing that the Court had engaged in "administrative downsizing," *id.* at 68, by cutting its docket of cases in a way consistent with a "new self-conception" of the Court, *id.* at 82).

<sup>285</sup>. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228-29 (2012). A belief in the Court's capacity to decide more cases is evident in various reform proposals. See, e.g., Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1382-85 (2006); see also Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010). See generally SUSAN LOW BLOCH ET AL., INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES 449-97 (2d ed. 2008) (titling chapter section "The Incredible Shrinking Caseload").

<sup>286</sup>. Bernard Schlink, a leading German critic of Alexy, has reportedly argued for a "reduced proportionality" test, which would end after the minimal impairment step. See Niels Petersen, *How To Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387, 1394-95 (2013). For a response to this argument, see *supra* note 103.

<sup>287</sup>. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 253-61 (William Rehg trans., MIT Press 1996); Tsakyrakis, *supra* note 269, at 473-75. Justice Scalia once famously declared that balancing rights is like trying to decide "whether a particular line is longer than a particular rock is heavy."

ments about the relative priority of two values can be rational.<sup>288</sup> An example is “large-small trade-offs” involving a small sacrifice of one value for a large gain in another.<sup>289</sup> It is a mistake to understand balancing in mathematical terms: rather, “proportionality as such” balancing should entail a reasoning process about the priority of one constitutional value as it relates to another in a particular setting.<sup>290</sup> It is also worth noting that “proportionality as such” is the last in a sequence of inquiries and therefore is part of a more structured decisional process than “all things considered” balancing.<sup>291</sup>

A final and significant set of concerns is that applying proportionality doctrine is incompatible with the basic concept of a constitutional right,<sup>292</sup> or

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Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); *see also* Aleinikoff, *supra* note 15, at 972-76 (discussing the problem of comparison and the development of a common scale).

**288.** See Aleinikoff, *supra* note 15, at 972 (describing critiques from incommensurability as overstated, as common scales can sometimes be found and “we expect courts to make [such] judgments in crafting common law doctrine”); Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS HUM. RTS. 35, 36-39 (2010) (agreeing with Alexy that balancing in the form of proportionality review “is essentially a rational process”).

**289.** David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 78 (1990). On the difference between an analysis that looks only at the *degree* to which a right is limited and a government purpose advanced, and an analysis that also evaluates the *relative importance* of both the right and the purpose, in the proportionality as such stage, see BARAK, *supra* note 22, at 364-65.

**290.** For a complex taxonomy of balancing, see MÖLLER, *supra* note 29, at 137-73.

**291.** See *id.* at 178-200 (emphasizing the importance of the structured sequence of queries in ensuring that only “a genuine conflict . . . of interests which cannot be resolved in a less restrictive but equally effective way” reaches the proportionality-as-such stage); Gertrude Lübbe-Wolff, *The Principle of Proportionality in the Case-law of the German Federal Constitutional Court*, 34 HUM. RTS. L.J. 12, 16 (2014) (discussing the importance of “distinguish[ing] the three levels of the [means] test and applying them in due order”); Lorraine Eisenstat Weinrib, *Canada’s Constitutional Revolution: From Legislative to Constitutional State*, 33 ISR. L. REV. 13, 33-34 (1999) (emphasizing the importance of beginning with the “prescribed by law” requirement).

**292.** Webber, *supra* note 136, at 125 (arguing that proportionality “fails to capture the moral priority of rights”). For a different objection to proportionality review relating to the character of rights, see Grant Huscroft, *Proportionality and the Relevance of Interpretation*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 186, 190-93, 202 (Grant Huscroft et al. eds., 2014) (emphasizing the particular, negotiated quality of those rights originally included in constitutions, writing that “[t]o focus on proportionality at the expense of interpretation” is to “recognize rights . . . not . . . part of the constitutional settlement”). For my response to arguments that sound in originalist or contractarian theories of interpretation, see Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPAC L. REV. 599 (2008).

might undermine the distinctively principled character of rights.<sup>293</sup> Carol Steiker, for example, has suggested that understanding proportionality to be a necessary condition for government action intruding on rights might lead to the idea that proportionality is *sufficient*, thereby “[o]ccupying the justificatory field.”<sup>294</sup> But on some accounts, even in jurisdictions applying proportionality analysis, one can recognize “core” aspects of rights that are viewed as entirely non-abrogable and not subject to limitation by arguments from proportionality.<sup>295</sup> Judicial elaborations of human dignity in Germany, for example, striking down a law authorizing the shooting down of hijacked civilian aircraft, or in Israel, prohibiting privatization of prisons, show that deontological analysis can coexist with extensive use of proportionality doctrine.<sup>296</sup> Moreover, structured proportionality analysis itself leaves room for the conclusion that a statute has an impermissible goal, one ruled out by the commitments to maintain-

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<sup>293</sup>. See Aleinikoff, *supra* note 15, at 998-99 (arguing that constitutional cases involving competing interests can be “resolved . . . by a principle” not derived from balancing).

<sup>294</sup>. Carol S. Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 194, 212 (Andrew Ashworth et al. eds., 2013); see also Aleinikoff, *supra* note 15, at 987, 991 (arguing that balancing “transform[s] constitutional discourse into a general discussion of the reasonableness of governmental conduct,” rather than focusing on interpretation of “peremptory norms”).

<sup>295</sup>. See Rivers, *supra* note 245, at 180 (noting that the “state-limiting conception of proportionality sometimes assumes that there is an absolute minimum to each right, a core content, which may not be violated on any account”); see also BARAK, *supra* note 22, at 27 (discussing “absolute” rights, such as no slavery), *id.* at 497-98 (discussing the relationship between the “core” of a right and disproportionality); Grimm, *supra* note 2, at 386 (noting the German Basic Law provision that “no limitation may affect the very essence of the fundamental right”); Esin Örücü, *The Core of Rights and Freedoms: The Limit of Limits*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 37, 45-53 (Tom Campbell et al. eds., 1986) (describing the “core” of rights in Germany and Turkey). But cf. ALEXY, *supra* note 19, at 192-96 (arguing that there is no “core” other than that constituted through the application of proportionality analysis). For an effort to reconcile these views, see KLATT & MEISTER, *supra* note 275, at 66-68.

<sup>296</sup>. The German aviation security case signals that despite the limitations clauses in the German constitution and the German Constitutional Court’s widespread resort to proportionality analysis, “collective goods may not, under any circumstances, outstrip individual rights.” Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 7 GERMAN L.J. 761, 772 (2006). The Israeli prison privatization decision similarly reasons that it is not “the nature of the prison or the concessionaire,” but rather the “very principle of privatizing prisons” that “violates the hard core of personal liberty.” Avirama Golan, *Beinisch Drops a Bombshell*, HAARETZ, Nov. 20, 2009, <http://www.haaretz.com/print-edition/news/beinisch-drops-a-bombshell-1.3776> [http://perma.cc/F3BJ-ZBT6]; see also Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision To Invalidate Prison Privatization*, 8 INT’L J. CONST. L. 690, 690-91 (2010) (noting that the decision “stipulates that . . . prison privatization is unconstitutional per se”).

ing rights in a free and democratic society.<sup>297</sup> Beginning the analysis with an inquiry into purpose and then focusing on the nature of the right and the severity of its infringement can help mitigate important concerns with narrowing of the “justificatory field.”<sup>298</sup>

#### B. Arguments from Lack of Fit with U.S. Constitutionalism

It is sometimes argued that Canadian or European approaches to rights analysis do not fit well with already developed U.S. constitutional law. To be sure, a highly contextualized analysis is necessary in evaluating whether approaches in one legal system can usefully be adapted in another. At the same time, it is important to recognize the multiple strands of possibilities for change within particular legal cultures.<sup>299</sup> U.S. constitutional case law already includes several lines informed by the basic idea, and several of the doctrinal components, of proportionality review. Although the United States is unlikely to adopt proportionality as a general principle applicable to all challenges to government action, there is good reason to think that, in some discrete areas, U.S. constitutional law could benefit from greater use of both the principle and the structured doctrine of proportionality.

While the United States does not have the kind of limitations clause found in post-World War II constitutions, U.S. jurisprudence recognizes that limits

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<sup>297</sup>. See, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] S.C.R. 295 (Can.) (invalidating a statute found to have an illegitimate purpose (coercing religious observance), with no further Section 1 analysis); see also cases cited *supra* note 82.

<sup>298</sup>. See *Perju*, *supra* note 228, at 352 (arguing that inquiry into government purpose at the outset of proportionality analysis offers a theoretical possibility of deontological constraint). Deontological inquiry may also be required to determine the nature of the right and severity of its infringement. See *BARAK*, *supra* note 22, at 45-51 (describing how the right’s scope is determined by interpreting constitutional text, and noting distinction between “core” and “penumbra” of right); see also *supra* notes 295-296; cf. *Perju*, *supra* note 228, at 354 (discussing the “core” and “periphery” of rights). *Perju* argues that in practice the potential of purpose inquiries to impose constraints has not been realized. *Id.* at 352-53. But see *supra* notes 82, 297 (discussing Canadian cases finding insufficient purpose). Determining what is a sufficient purpose to warrant an infringement on rights is itself connected to a conceptual understanding of the right and its purpose. Cf. *BARAK*, *supra* note 22, at 248 (arguing that purposes sufficient to justify intrusion on rights “may vary . . . from one right to another”). Some critics argue that proportionality review, coupled with limitations clauses that expressly acknowledge that rights may be limited with sufficient justification, will diminish rights protection as a whole. See, e.g., *Rao*, *supra* note 126, at 227-37. Whether proportionality review would have this effect is likely to be highly context dependent. In the context of categorical rules that, as in *Atwater*, or *Florence*, arguably under-protect rights, proportionality review would likely advance rights protection.

<sup>299</sup>. See Vicki C. Jackson & Jamal Greene, *Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?*, in *COMPARATIVE CONSTITUTIONAL LAW* 599 (Tom Ginsburg & Rosalind Dixon eds., 2011).

on matters ordinarily understood as protected by rights can sometimes be constitutionally justified. Indeed, U.S. constitutional law in many areas contemplates “triggering rights” that generate strict review but that in the end, may not be “final rights” because the “triggering right” may be subject to limitation.<sup>300</sup> Influences on contemporary “limitations” clauses are many, but among them is the provision of Article 29 of the Universal Declaration of Human Rights (UDHR),<sup>301</sup> whose language was influenced by a proposal from an American Law Institute (ALI) committee.<sup>302</sup> The German Constitutional Court’s influential proportionality doctrine did not derive primarily from the express limitations clauses of the Basic Law but rather from judicial elaboration of constraints on government regulation in the course of interpreting police law in the nineteenth century.<sup>303</sup> And, as Stephen Gardbaum has argued, notwithstanding the absence of an explicit limitations clause, basic approaches to rights interpretation in the United States have much in common with those in countries explicitly using proportionality review.<sup>304</sup>

Nonetheless, some scholars have suggested that U.S. legal culture is hostile to proportionality review. They argue that balancing in the United States developed as an effort to limit the power of courts (acting on behalf of rights) to

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<sup>300.</sup> Fallon, *supra* note 6, at 1316–17.

<sup>301.</sup> The UDHR provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 29(2) (Dec. 10, 1948).

<sup>302.</sup> See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 44 (1982) (stating that the reference to “democratic society” in article 29(2) of the UDHR was inserted by the drafters “on the basis of a similar clause in the statement of essential human rights, prepared in 1946 by a committee of the American Law Institute and presented to the United Nations by Panama” (citation omitted)). For the ALI Committee proposal, see Am. Law Inst., *Statement of Essential Human Rights*, 243 ANNALES AM. ACAD. POL. & SOC. SCI. 18, 26 (1946).

<sup>303.</sup> On the origins of Germany’s constitutional proportionality doctrine in judicially developed nineteenth century law, see COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 24–32. On the relative insignificance of limitations clauses in Germany’s constitutional proportionality doctrine, see Grimm, *supra* note 2, at 386.

<sup>304.</sup> Gardbaum, *supra* note 5, at 419–31 (arguing, with respect to the justification for government actions claimed to infringe rights, that differences between the U.S. approach and “proportionality review” are “both far less and far less significant than generally claimed” because, like U.S. “tiers” of scrutiny, proportionality tests are themselves applied with variable intensity and because many elements of analysis, relating to the degree of fit between government goals and the means used, for example, are similar).

interfere with legislative outcomes, rather than, as in Germany, as a way of formalizing and protecting rights.<sup>305</sup> *Dennis* is sometimes described as “symboliz[ing] to this day the most troubling risk of balancing: the danger of judicial capitulation to the legislature’s determination of the balance of interest in times of national security crisis,” a case whose “stigma” led the Court thereafter to “dissociate[]” itself from balancing.<sup>306</sup> This adverse reaction to balancing was, in important part, historically contingent,<sup>307</sup> and may now be weakening, at least in national-security inflected First Amendment case law.

Even if we assume that the predominantly categorical conceptual structure of free speech law will survive, there are a number of areas of contemporary constitutional rights law in which the U.S. does use balancing, or even proportionality.<sup>308</sup> Richard Fallon, in describing strict scrutiny, notes that in addition to sometimes functioning as a close-to categorical rule, at other times strict scrutiny is applied as if it were “a weighted balancing test, similar to European proportionality inquiries.”<sup>309</sup> Moreover, outside of cases governed by strict scrutiny, balancing tests are alive and well, and not necessarily hostile to rights

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<sup>305.</sup> See COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 43; see also *id.* at 154 (concluding that there has been a “relative marginalization of balancing in . . . American constitutional law, as a pragmatic exception to the construction of rights as categorical limitations on state power”); cf. BOMHOFF, *supra* note 2, at 143-89 (noting balancing’s development in the U.S. as an alternative in contest with more “absolutist” approaches, still viewed through the lens of debates in the 1950s and 1960s about balancing).

<sup>306.</sup> COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 42.

<sup>307.</sup> Aleinikoff’s attack on balancing, and Justice Scalia’s argument for rule-like approaches, published within two years of each other, may have been important influences on the historical trajectory. See Aleinikoff, *supra* note 15; Scalia, *supra* note 16. Justice Scalia’s argument—that the rule of law is best understood as a law of rules—ignores the important role of equitable traditions in shaping law to apply justly to concrete facts. Compare Aristotle’s discussion of the need for rectification of inequitable applications of general rules:

[A]ll law is universal and yet there are some things about which it is not possible to make correct universal pronouncements. . . . [W]henever the law makes a universal pronouncement, but things turn out in a particular case contrary to the ‘universal’ rule, on these occasions it is correct, where there is an omission by the lawgiver, and he has gone wrong by having made an unqualified pronouncement, to rectify the deficiency by reference to what the lawgiver himself would have said if he had been there . . . And this is the nature of the reasonable: a rectification of law, in so far as law is deficient because of its universal aspect.

ARISTOTLE, *supra* note 54, at 174.

<sup>308.</sup> See text accompanying *supra* notes 43-50.

<sup>309.</sup> Fallon, *supra* note 6, at 1302-08; *see id.* at 1305 (discussing cases where strict scrutiny has not, in fact, been fatal, such as *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Indeed, Fallon has noted more generally the resonances between strict scrutiny and proportionality analysis. *See id.* at 1295 (discussing the narrow tailoring requirement); cf., e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (balancing the liberty interests of pregnant women against state interests in health and fetal life to identify permitted regulation at different stages of pregnancy).

protection. In *Hamdi v. Rumsfeld*,<sup>310</sup> the plurality drew on the 1976 decision in *Mathews v. Eldridge*<sup>311</sup> for “[t]he ordinary mechanism that we use for balancing such serious competing interests” to decide what process was due an American citizen detained as an enemy combatant.<sup>312</sup> The invocation of balancing was rights-protecting insofar as the government had argued that “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict’ ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme.”<sup>313</sup> The Court rejected this and other arguments.<sup>314</sup> A more accurate way to describe U.S. constitutional law is thus that in important areas the Court relies on balancing tests but does so in a less systematic way than its Canadian or German counterparts.

Some scholars argue further that U.S. constitutional law focuses on the “intent” of government actors, not the “effects” of their actions, in defining constitutional rights, an approach claimed to be incompatible with proportionality’s concern both with a challenged act’s purpose and its effects.<sup>315</sup> But in some areas, narrowly focused intent tests have only recently—and contestedly—replaced more effects-oriented approaches.<sup>316</sup> One should not mistake a phenomenon that is no doubt present in some areas for a more general state of affairs.<sup>317</sup> There are other significant swathes of U.S. constitutional law that are or have been effects-oriented. This is so not only in the Dormant Commerce Clause ar-

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<sup>310.</sup> 542 U.S. 507, 528–29 (2004).

<sup>311.</sup> 424 U.S. 319 (1976).

<sup>312.</sup> *Hamdi*, 542 U.S. at 528–29 (plurality opinion).

<sup>313.</sup> *Id.* at 527.

<sup>314.</sup> *Id.* at 526–27 (also rejecting arguments that because Hamdi was seized in a combat zone, no other process was necessary; that no judicial review is proper in an ongoing conflict; or that “at most” only “some evidence” was required). It could be argued, however, that the “balancing” approach adopted by the Court was also rights-undermining, insofar as it facilitated rejecting the position, argued by Justice Scalia, that for a citizen, detention and trial had to be by ordinary criminal process, with speedy trial rights and the full panoply of criminal procedure rights, *see id.* at 572 (Scalia, J., dissenting), a position the plurality rejected, *id.* at 522–24 (plurality opinion).

<sup>315.</sup> COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 64–78.

<sup>316.</sup> *See Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (displacing the approach of *Sherbert v. Verner*, 374 U.S. 398 (1963), over the objections of four Justices).

<sup>317.</sup> Cohen-Eliya and Porat do recognize exceptions to their generalization, in the possibility of exceptions to bans on race discrimination to “avoid drastic outcomes,” or in the “clear and present” danger tests for free speech in the early twentieth century, bodies of law they describe as a “consequentialist constraint” on an otherwise intent-based deontological system. *See* COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 71–72.

ea,<sup>318</sup> but is also characteristic of the second (effects) and third (entanglement) prongs of the *Lemon v. Kurtzman* test for Establishment Clause claims.<sup>319</sup> Further, in Takings Clause jurisprudence, one inquiry focuses primarily on the effect of the challenged regulation on the property owner.<sup>320</sup> In the First Amendment context, when “incidental” burdens on free speech result from content neutral regulation, the Court still applies an intermediate form of scrutiny.<sup>321</sup> Although for some purposes the Sixth Amendment right to counsel looks to the intent of state actors,<sup>322</sup> for other purposes the effects of action are the significant factors, as in determinations of ineffective assistance of counsel.<sup>323</sup> Since 1997, *Casey’s* “undue burden” test has asked whether a regulation has the “purpose or effect” of creating a substantial obstacle to a woman’s choosing to abort a pre-viable fetus.<sup>324</sup> And in Fourth Amendment law, the Court has determinedly turned away from intent. The Court has insisted that

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<sup>318.</sup> See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Cohen-Eliya and Porat recognize the dormant commerce clause as another exception to their generalization about intent. *See infra* note 395.

<sup>319.</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that to comply with the Establishment Clause, statutes must have a secular purpose and must have a principal effect that neither advances nor inhibits religion, and must not excessively “entangle” the government with religion); *see also* *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 859 (2005) (referring to the “three familiar considerations for evaluating Establishment Clause claims” set forth in *Lemon*); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (noting the three-part *Lemon* standard and concluding that a religious purpose alone can condemn a rule); Bd. of Educ. of *Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 697 (1994) (invoking “entanglement” and effects prongs of *Lemon*).

<sup>320.</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005) (discussing a regulation’s economic impact on the claimant, focusing “directly upon the severity of the burden that government imposes upon private property rights”); *id.* at 542 (noting significance of the “magnitude or character of the burden a particular regulation imposes upon private property rights”); *see also* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”).

<sup>321.</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-63 (1994). Thus, even when there is no intent to regulate speech on account of its content, some heightened scrutiny still applies.

<sup>322.</sup> Government conduct that “deliberately” elicits incriminating statements from a suspect in the absence of counsel is forbidden. *See Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

<sup>323.</sup> See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986) (applying an “objective reasonableness” plus prejudice test to determine if there was a denial of constitutional right to effective assistance of counsel at trial); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (articulating two standards to guide ineffective assistance of counsel claims: factual deficiency in counsel’s performance and prejudicial effect).

<sup>324.</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.).

the actual intent of police officers in making a stop or arrest is irrelevant; what matters is whether there was an objective basis for a “reasonable suspicion” or for probable cause; the fact that the police may actually have been motivated to make a stop because of the suspect’s race, or preexisting bias against the suspect, is not relevant under the Fourth Amendment.<sup>325</sup> In this light, it is not accurate to describe U.S. law as having a general propensity only to be concerned with intent and not with effects.

Recent scholarship has also suggested that the United States is more skeptical about the possibilities of law in the hands of judges (and thus of proportionality review) than are Canada or Germany.<sup>326</sup> The United States is, to be sure, more willing to leave to democratic processes decisions that, elsewhere, would be made by more expert, elite decision makers (as in the popular election of judges in many states within the United States). The U.S. Supreme Court is an empowered, activist Court, however, even without proportionality review; it has invalidated a significant number of federal statutory provisions since the early 1980s, in cases that include *INS v. Chadha*,<sup>327</sup> *NFIB v. Sebelius*,<sup>328</sup>

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<sup>325.</sup> See *Whren v. United States*, 517 U.S. 806, 813 (1996) (stating that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment” and holding that “the constitutional reasonableness of traffic stops” does not “depend[] on the actual motivations of the individual officers involved”); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“[T]he standard of probable cause ‘applie[s] to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations.’” (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979))); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) (confirming that “the subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment”); *Scott v. United States*, 436 U.S. 128, 136 (1978) (“Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.”); *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973) (finding it irrelevant whether the officer “may have used” a “subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate” if a warrant had been sought); *id.* at 236 (“[I]t is of no moment that [the Officer] . . . did not himself suspect that respondent was armed.”).

<sup>326.</sup> See COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 82–93 (contrasting U.S. epistemological skepticism with German epistemological optimism); BOMHOFF, *supra* note 2, at 242–43; *see also id.* at 190 (observing that balancing in the U.S. is viewed “with suspicion rather than aspiration,” in contrast to Germany, where it forms part of a comprehensive constitutional order, an underlying “perfectionism”). Bomhoff as well as Cohen-Eliya and Porat assume, in talking about constitutional law, that the object of discussion is judicial decisions; suspicion of law, in this context, is suspicion of judge-made law. In this sense, their comparison resonates with Jed Rubenfeld’s observations that there are “two world orders.” Jed Rubenfeld, *The Two World Orders*, 27 WILSON Q. 22, 22–36 (2003). In one, international constitutionalists (many European) are more attached to “reason” than to “popular will”; in the other, democratic constitutionalists (many Americans) are more inclined to respect democratic decision-making than “reason” by politically unaccountable experts. See Rubenfeld, *supra* note 139, at 1991–95.

<sup>327.</sup> 462 U.S. 919 (1983).

*Citizens United v. FEC*,<sup>329</sup> *City of Boerne v. Flores*,<sup>330</sup> and several other First, Eleventh, and Fourteenth Amendment cases.<sup>331</sup> Meanwhile, public confidence in Congress is at astonishingly low levels;<sup>332</sup> a recent *Harvard Law Review* Foreword commented on the Supreme Court's apparent "disdain" for Congress.<sup>333</sup> Even if people believe their elected representatives are more legitimate decision makers than judges, they surely would not intend for legislators to act without reason, or to act in an abusive way.<sup>334</sup> If judicial doctrine on proportionality can better focus legislators on good reasons for their action and at the same time encourage courts to take more seriously legislators' reasons for acting, it may be a net gain for democratic decision making.<sup>335</sup>

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<sup>328.</sup> 132 S. Ct. 2566 (2012).

<sup>329.</sup> 558 U.S. 310 (2010).

<sup>330.</sup> 521 U.S. 507 (1997).

<sup>331.</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>332.</sup> See *Confidence in Institutions*, GALLUP (June 2014), <http://www.gallup.com/poll/1597/confidence-institutions.aspx> [<http://perma.cc/ST7G-ETEK>] (showing Congress as the lowest scoring of all institutions the public was asked to rate their confidence in – including the military, small businesses, the Presidency, the Supreme Court, the police, medical system, banks, newspapers, organized labor, and big business – with less than ten percent of those surveyed expressing "a great deal" or "quite a lot" of confidence in Congress).

<sup>333.</sup> Pamela S. Karlan, *The Supreme Court, 2011 Term – Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12–13 (2012) (suggesting that "the current Court . . . combines a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress's enumerated powers," amounting to "judicial disdain").

<sup>334.</sup> See, e.g., Waldron, *supra* note 264, at 23 (describing the legislative "duty to take care" that proposed laws are "fair . . . and solicitous of the rights as well as the interests of all whom they affect"); see also Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373 (2003) (arguing that transparency, respect for loyal opposition, and openness to dissenting views are part of what gives the legislative process its integrity).

<sup>335.</sup> Canada's constitution includes another device that could theoretically be viewed as promoting such dialogues: the provisions of Charter Section 33 permitting a provincial or national parliament to "override" certain Charter freedoms for up to five years. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 33 (U.K.). In practice, Section 33 (also known as the "Notwithstanding Clause") has been seldom used outside Quebec and its use has been criticized for not achieving dialogical goals. See, e.g., Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 275–95 (1995); see also Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613, 620 n.25 (2014) (reporting that the override has been used a total of seventeen times, only by provincial legislatures, and that its last use was in 2000 (citing Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 43 CANADIAN ADMIN. 255 (2001))).

Other kinds of objections to proportionality review flow from general interpretive approaches in the United States. Originalist claims are a distinctive feature of contemporary U.S. constitutional law; their force owes much to a historically specific reaction to the Warren Court's legacy.<sup>336</sup> Those committed to resolving constitutional controversies only by resort to the "specific meaning" of constitutional provisions at the time of the founding would presumably make less use of proportionality-like analyses. For most Justices, however, original understandings are only the beginning and not the end of analysis,<sup>337</sup> and some questions simply cannot be resolved by resort to specific original understandings.

Some academic proponents of proportionality go too far in suggesting that text and precedents do not matter.<sup>338</sup> In so doing they ignore important foundations of law's legitimacy. Texts and their history and purpose matter: proportionality alone cannot provide a substantive theory of what interests are within the scope of rights. Specificity matters: a constitution requiring payment of "just compensation" for the taking of property imposes constraints that may not be enforced in its absence. *Stare decisis* emphasizes the role of precedent in constitutional adjudication (except where departures are sufficiently justified), thereby linking past, present, and future in a stable but flexible continuity. The long lines of precedent in many areas of individual rights, the different character of different rights, and other factors discussed below, caution against any massive reconstruction of U.S. constitutional law through the lens of proportionality.

#### V. DEFINING THE BOUNDARIES FOR PROPORTIONALITY REVIEW

I do not argue that the United States should embrace proportionality across the board. For one thing, the U.S. Constitution does not provide as clear a textual basis as exists in Canada for the adoption of proportionality as a pervasive

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<sup>336</sup>. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659-60, 674-82 (2009).

<sup>337</sup>. On the range of sources regarded as legitimate in the "eclectic" U.S. approach to constitutional interpretation, see JACKSON, *supra* note 118, at 134-38; Fallon, *A Constructivist Coherence Theory*, *supra* note 233; and Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 7 (Jeffrey Goldsworthy ed., 2006). See also *supra* note 233.

<sup>338</sup>. See, e.g., BEATTY, *supra* note 1, at 47, 87-89 (praising reliance on "facts" rather than "text" and critiquing reliance on precedent); cf. MÖLLER, *supra* note 29, at 57-90, 88 (describing the "comprehensive," "protected interests" conception of autonomy, and concluding that "nothing would be lost in theory by simply acknowledging one comprehensive *prima facie* right to personal autonomy" instead of listing specific rights, such as freedom of expression).

test.<sup>339</sup> The U.S. Supreme Court is not in the position of the Canadian courts interpreting the 1982 Charter, nor the German Court interpreting the 1949 Basic Law; the United States has no new charter of rights subject to interpretation for the first time. And the United States is a large country, with highly decentralized opportunities for judicial review in multiple court systems; a greater need may exist for categorical rules to achieve acceptable levels of consistency in the law (even if the Supreme Court were to expand its docket). Moreover, where reasonably well-functioning lines of law exist, developed over time, there may be insufficient reason to unsettle the law. Not all rights protected by the Constitution involve the kinds of principles that can best be applied through ideas of proportionality. Some rights may be better understood as concrete rules, requiring particular procedures to legalize the government's use of coercive power.<sup>340</sup> Other rights can be better viewed as normatively nonderogable guarantees.<sup>341</sup>

Finally, even when rights have components concerned with promoting proportionate government conduct, case-by-case application of proportionality standards may not be the best approach; formal application of a categorical rule over the course of cases may result in a better group of decisions overall.<sup>342</sup> Given the draw of consistency in adjudication, moreover, rules are likely to emerge even from case-by-case applications of a proportionality standard;<sup>343</sup> and what some call "definitional balancing" or "categorical balancing" might be reconceptualized to reflect conceptions of proportionality in light of the purposes of the right and its implementation in a decentralized system of justice. The goal of proportionality in government action, in the sense of justice and good governance by actual institutions, may sometimes be better served by more categorical rules.<sup>344</sup> How then should judges determine whether an area calls for a more categorical, or case-by-case application of proportionality standards?

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339. Cf. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

340. See, e.g., U.S. CONST. amend. V (grand jury requirement); *id.* amend. VI (trial by jury). On the distinction between constitutional rights as "rules," capable of definitive satisfaction, and as "principles" demanding "optimization," see ALEXY, *supra* note 19, at 44-66.

341. See Jackson, *supra* note 225, at 850 (noting that there "may be some individual rights," like rights against torture, "that we would want categorized as nonderogable rights").

342. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 541 (1988).

343. See Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 318; see also Tushnet, *The First Amendment*, *supra* note 251, at 106 (citing Duncan Kennedy on the move from standards to rules); cf. ALEXY, *supra* note 19, at 373-77 (discussing the role of precedent, based on concrete rules derived from prior decisions, in German constitutional adjudication).

344. To the extent that proportionality tests are concerned, in part, with the effects of government actions, this possibility corresponds with the concept of "rule-consequentialism," as compared with "act-consequentialism." See Brad Hooker, *Rule Consequentialism*, STAN.

### A. *Different Rights, Different Roles, Different Texts*

Not all rights have the same conceptual structure.<sup>345</sup> Nor do all rights play the same role within the constitutional system. Some rights, like those associated with the Establishment Clause, have been viewed by some as concerned primarily with “excluded reasons” for government action.<sup>346</sup> Doctrine implementing rights, like those secured by the Fifth Amendment Takings Clause, may on occasion draw on proportionality principles to analyze nonphysical actions of government that are claimed to constitute takings,<sup>347</sup> but at the same time treat even minor permanent physical invasions as *per se* takings for conceptual or historical reasons.<sup>348</sup> Further, the text of that right specifically provides the remedy for when a taking of property occurs—that is, payment of just compensation.<sup>349</sup>

The First Amendment’s protections of freedom of speech and association function as broad guarantors of democracy, securing freedom of political competition; they prohibit government conduct motivated by a desire to suppress dissent; and they secure a host of individual expressive freedoms. The First Amendment is also arguably emblematic of a particular form of constitutional identity for the United States.<sup>350</sup> Application of proportionality analysis in an individual case-by-case way might be considered inconsistent with the symbolic importance of treating the First Amendment as providing strong protections. But there is no conceptual obstacle to providing strong rights protection through proportionality analysis by treating a government purpose to suppress

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ENCYCLOPEDIA PHIL. (Jan. 9, 2008), <http://plato.stanford.edu/archives/spr2011/entries/consequentialism-rule> [<http://perma.cc/4QHN-Q5XJ>]; Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL. (Sep. 27, 2011), <http://plato.stanford.edu/archives/spr2014/entries/consequentialism> [<http://perma.cc/79CE-6ATH>].

<sup>345</sup>. See, e.g., Fallon, *supra* note 83, at 351–68 (differentiating between categories of rights concerned with well-being and material conditions, autonomy, and dignity and those concerned with maintaining government within law, while arguing that all rights are interdependent on government interests); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637–42 (1991) (describing some constitutional rights as pre-political, natural rights that ought to operate as constraints on any government).

<sup>346</sup>. See Pildes, *supra* note 35, at 725–27. For other rights claimed to be primarily concerned with excluding certain reasons for government action, see *id.* at 731–49.

<sup>347</sup>. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 386–91 (1994).

<sup>348</sup>. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

<sup>349</sup>. See U.S. CONST. amend. V; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841–42 (1987).

<sup>350</sup>. Cf. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* xi, 9 (1991) (noting an American “penchant for absolute formulations”); J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 278 (2010) (arguing that the assertion of rights in absolute terms is emblematic of U.S. national identity).

ideas as per se illegitimate and by treating the value of freedom of expression as presumptively stronger than reasons for suppression in the “proportionality as such” stage. Still, categorical statements of presumptive rules might be thought to accomplish this in ways more consistent with symbolic or expressive aspects of this amendment (and its “shall make no law” text). But such categorical rules—including categorical exclusions for regulation for obscenity<sup>351</sup> or fighting words<sup>352</sup>—can themselves be informed by considerations of proportionality. The possibility of identity-reinforcing benefits in framing First Amendment jurisprudence in the form of presumptive categorical rules does not answer what those rules should be or what exceptions to a categorical presumption against content-based regulation should be recognized.

Use of proportionality doctrine to review the reasonableness of a search is a different matter than its use to review free speech claims. The Fourth Amendment’s text protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .”<sup>353</sup> Strong considerations of the rule of law and of popular conceptions of justice would support a proportionality approach to some Fourth Amendment issues now governed by categorical rules. Some years ago a scholar wrote: “When an officer acts reasonably, it would torture the English language to condemn his action as an unreasonable search.”<sup>354</sup> Likewise, when an officer acts “unreasonably,” as the officer did in *Atwater*, it tortures any popular sense of what the Fourth Amendment means to find no violation. To treat the Fourth Amendment as favoring categorical rules to the same degree as the seemingly more absolute language of the First Amendment is to suggest that the text does not matter.<sup>355</sup> And to assume that the proliferation of categorical rules will help constrain rather than liberate official discretion of police officers may be more heroic than realistic.<sup>356</sup>

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351. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 n.4, 57-60 (1989); *Miller v. California*, 413 U.S. 15 (1973).

352. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

353. U.S. CONST. amend. IV.

354. Alschuler, *supra* note 248, at 233.

355. Other scholars have noted the Court’s inconsistencies, sometimes within the space of months, on the use of all-things-considered and more context-dependent standards, as compared to rule-like, categorical approaches to Fourth Amendment issues. See, e.g., Sklansky, *supra* note 248, at 277-80, 291-98 (discussing *Whren v. United States*, 517 U.S. 806 (1996), *Ohio v. Robinette*, 519 U.S. 33 (1996), and other cases, and identifying inconsistencies).

356. See Alschuler, *supra* note 248, at 287 (“What renders substantive [F]ourth [A]mendment law incomprehensible, however, is not the lack of categorical rules but too many of them.”); Note, *The Fourth Amendment’s Third Way*, 120 HARV. L. REV. 1627, 1627 (2007) (“Scholars agree on very little concerning the Fourth Amendment, but one of the few propositions that nearly everyone accepts is the almost incomparable incoherence of its doctrine.”); see also Si-

### B. Remedial Constraints

Adjudications of liability are always nested in particular remedial systems. The remedies available or required, and their consequences, may have constraining effects on how courts are willing to define the underlying right.<sup>357</sup>

#### 1. The Exclusionary Rule

In the United States, Fourth Amendment remedial rules requiring exclusion of evidence have been applied, at least for a time, in a seemingly categorical manner.<sup>358</sup> By contrast, in Canada the consequence of finding a violation of Charter rights is not necessarily exclusion of the evidence: under Charter Section 24, courts decide, case by case, whether admitting the evidence would “bring the administration of justice into disrepute.”<sup>359</sup> The apparent rigidity of the U.S. exclusionary rule may thus militate against more generous interpretation of the right because of the consequences to criminal justice administration. Yet proportionality approaches might also support modifications in the U.S. approach to the exclusionary rule.<sup>360</sup>

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las J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 22-44 (1988) (discussing “Fourth Amendment Formalism” and the Court’s failure to attend to the reasonableness requirement).

357. For insightful analysis of this proposition in the context of immunity rules, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-54 (1998).

358. See *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961). In the 1990s, Carol Steiker noted increasing exceptions to the exclusionary rule and other cutbacks in the remedial efficacy of constitutional criminal procedural rules. Steiker, *supra* note 161, at 2504-21, 2532-40 (noting the weakening of the exclusionary rule not only by the creation of exceptions to its force, but by virtue of law enforcement officers’ awareness of these exceptions). More recently, the extent to which the exclusionary rule applies categorically to evidence obtained in violation of the Fourth Amendment has been under serious debate. See *Herring v. United States*, 555 U.S. 135, 140-46 (2009); *id.* at 148-57 (Ginsburg, J., dissenting); *id.* at 157-59 (Breyer, J., dissenting); *see also* Adam Liptak, *Supreme Court Eases Limits on Evidence*, N.Y. TIMES, Jan. 14, 2009, <http://www.nytimes.com/2009/01/15/washington/15scotus.html> [<http://perma.cc/C2E8-NRT5>] (reading *Herring* as a debate over whether judges should use a “sliding scale” to determine the applicability of the exclusionary rule, or take a more “categorical” approach).

359. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 24 (U.K.) (providing that where “evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”); *see also, e.g.*, R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 (Can.).

360. On the possibility that modifications are already under way, see *supra* note 358.

William Stuntz suggested that the absence of attention to proportionality—including the “blindness to differences among crimes”—is one of the deepest problems in Fourth Amendment law.<sup>361</sup> The trans-substantive doctrine of the Fourth Amendment, he argued, created a “reasonableness” gap in the application of the Fourth Amendment’s substantive standard.<sup>362</sup> Stuntz also suggested that while the U.S. version of the exclusionary rule serves many useful purposes, the remedy has adversely affected the crafting of substantive Fourth Amendment doctrine and misdirected resources away from more fundamental questions of guilt or innocence.<sup>363</sup> Given the number of existing exceptions to the exclusionary rule, it is possible that more might be gained than lost by adopting a more proportionate approach both to the substantive standards of the amendment and, possibly, even to the consequences of illegality.<sup>364</sup>

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- <sup>361.</sup> William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843 (2001) (criticizing the transsubstantive application of rules of criminal procedure); *see also* Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (distinguishing between a roadblock to find a kidnapper and a roadblock to find a bootlegger in Fourth Amendment analysis); Alschuler, *supra* note 248, at 247 (“Plainly, the concept of probable cause should be sufficiently flexible to recognize . . . critical difference[s] in circumstances [of very serious and less serious crimes].”). For a different conception, also applying proportionality to the reasonableness of a search, see Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 4, 47–55 (1991) (calling for application of a “proportionality principle,” that “the level of certainty required to authorize a particular search or seizure should be roughly proportional to the level of its intrusiveness,” while generally rejecting differences in the severity of past criminal acts under investigation as relevant).
- <sup>362.</sup> Stuntz, *supra* note 361, at 847 (comparing two searches, one in connection with a possible bomb, the other in connection with a local marijuana crime, in which “[t]he different benefits [of the searches] flow from the different crimes the police were investigating” and those “different benefits make for different balances: one of these searches was a good deal more reasonable than the other”).
- <sup>363.</sup> *See id.* at 871 n.94 (noting that the extension of the exclusionary rule to states “not only defined the Fourth Amendment’s primary remedy but shaped its content as well, by ensuring that most Fourth Amendment law would be made in the context of motions to suppress incriminating evidence”); Stuntz, *supra* note 232, at 38–39, 50 (arguing that the suppression remedy attracts resources to suppression hearings rather than substantive defenses, and that “[t]he manner in which suspects are arrested—how much force the police use, and whether they tend to use more force on some kinds of suspects than others—is regulated only slightly, because police violence tends not to be tied to police evidence gathering, and only evidence gathering is likely to give rise to exclusionary rule claims”).
- <sup>364.</sup> Some Justices argued for modification of the exclusionary rule in the 1970s, invoking foreign experience in doing so. *See* California v. Minjares, 443 U.S. 916, 919 (1979) (Rehnquist, J., dissenting from denial of a stay); Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (quoting scholarly discussion of why the exclusionary rule cannot be necessary for judicial integrity “when no such rule is observed in other common law jurisdictions such as England and Canada, whose courts are otherwise regarded as models of judicial decorum and fairness” (citation omitted)); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (stating that the exclusionary

## 2. Equal Protection

Distinct remedial challenges are posed by successful equal protection claims, as their redress may require changes adversely affecting nonparties. For example, if a benefit is made available on terms found discriminatory, there may be options to equalize down, as well as up.<sup>365</sup> Remedial complications may help explain why courts that apply proportionality principles in equality cases do so more deferentially in evaluating challenges to economic or commercial regulations.<sup>366</sup>

Given respect for democratic decision making, interests in the stability of law, and concern for the reasonable expectations of third parties, there are reasons for caution in the application of equal protection standards to the great mass of legislation.<sup>367</sup> Indeed, in *Washington v. Davis*,<sup>368</sup> the Court rejected disparate impact based on race as a trigger for strict scrutiny, expressing concern that many statutes could not meet the standards of justification required by strict—then usually fatal—scrutiny. Experience with proportionality review elsewhere suggests that equal protection review could be implemented in a more proportionate way, one that does not automatically invalidate laws with such disparate impacts and that can recognize differences in the severity of impacts, especially on historically disadvantaged groups.<sup>369</sup>

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rule “is unique to American jurisprudence” and not followed in either England or Canada). Reconsidering U.S. law in light of proportionality tees up this issue; resolving it requires more analysis than space here permits.

<sup>365.</sup> See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36–43 (1976) (discussing remedial problems that may arise from disparate impact liability under the Equal Protection Clause). Severability analysis may be important, as courts work to determine whether the legislature would prefer to see a benefit extended or withdrawn. Extended times for legislative compliance might also be called for were equal protection doctrine to become more robust. In Germany, when the Federal Constitutional Court finds a statute incompatible with the equality guarantees of the German Basic Law, the Court may decide not to invalidate the statute but declare only that it is “incompatible” with the Basic Law and allow a set period of time for the legislature to enact new legislation. See DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 35–37, 426–47 (3d ed. 2012) (noting a 2006 decision that gave the legislature until July 1, 2007 to act).

<sup>366.</sup> See *infra* note 422; see also *infra* note 369.

<sup>367.</sup> See, e.g., Brest, *supra* note 365, at 36–43; Jeremy Webber, *Democratic Decisionmaking as the First Principle of Contemporary Constitutionalism*, in THE LEAST EXAMINED BRANCH, *supra* note 30, at 424–25.

<sup>368.</sup> 426 U.S. 229 (1976). For a description of “strict scrutiny” as “strict” in theory and fatal in fact,” see Gunther, *supra* note 146, at 8.

<sup>369.</sup> See, e.g., Lübbe-Wolff, *supra* note 291, at 13 n.10 (noting stricter justification requirements for “unequal treatment differentiating between preexisting groups of persons,” for “unequal

Proportionality in equal protection review resonates with Justice Thurgood Marshall's "sliding scale" view of equal protection law.<sup>370</sup> In *Dandridge v. Williams*, the Court used relaxed "rational basis" review to uphold a state welfare law imposing a cap on benefits for families with dependent children that had the effect of giving less per child for children in families above a certain size.<sup>371</sup> For Justice Marshall, who dissented, there were differences of constitutional magnitude between classifications affecting businesses and classifications affecting poor children. These differences could be explained by reference to proportionality and a form of "process" theory that Justice Marshall explicitly invoked.

A case involving "the most basic economic needs of impoverished human beings," Justice Marshall wrote, should not be reviewed under a mere rationality standard.<sup>372</sup> Such a rationality standard accepted "extremes . . . in dreaming up rational bases for state regulation" because of "a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls."<sup>373</sup> Here, Justice Marshall drew an implicit contrast between the interests of businesses, which can "protect themselves in the legislative halls," and the interests of much less powerful, poor human beings, including children.<sup>374</sup> He explained that where "the literally vital interests of a powerless minority[,] poor families without breadwinners," are involved, "the *relative* importance to individuals in the class discriminated against of the governmental benefits that they do not receive" required more careful analysis of the government's asserted reasons for the law.<sup>375</sup> Justice Marshall's emphasis on the *relative* importance of the rights is a plea for more proportionality in reviewing standards and in the justifications governments must proffer for the distinctions that their laws create.<sup>376</sup>

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treatment which the persons affected cannot escape," or for unequal treatment affecting fundamental freedoms); *infra* note 422.

<sup>370</sup>. See Gunther, *supra* note 146, at 17-18 (describing Justice Marshall's dissent in *Dandridge v. Williams*, 397 U.S. 471 (1970), as a "sliding-scale analysis").

<sup>371</sup>. 397 U.S. 471, 473-75, 485-86 (1970).

<sup>372</sup>. *Id.* at 508 (quoting *id.* at 485, majority opinion) (Marshall, J., dissenting).

<sup>373</sup>. *Id.* at 520 (Marshall, J., dissenting).

<sup>374</sup>. *Id.*

<sup>375</sup>. *Id.* at 520-21 (emphasis added).

<sup>376</sup>. For similar reasons, Justice Marshall famously dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 109 (1973), arguing that because "discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved," the Court should have more carefully scrutinized Texas's scheme relying on local property taxes to fund the free public education the State guaranteed its citizens.

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Justice Marshall's rejection of "a priori definition[s]"<sup>377</sup> in defining the standard of review reverberates with Justice Stevens's later argument that "[t]here is only one Equal Protection Clause,"<sup>378</sup> with a common standard: whether a legislature acting in good faith rationally could believe that the harm it was imposing was justified in support of a greater good. A single standard can be implemented with varying degrees of seriousness depending on the impact of the classification. An example of this kind of approach may be found in *Plyler v. Doe*.<sup>379</sup> Striking down a Texas statute denying public education to children who reside illegally in the country, the Court wrote:

In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.<sup>380</sup>

The idea in this passage from *Plyler* is that where the harm is great, a rational legislator would need much more convincing evidence of likely effectiveness towards a "substantial goal" before she could conclude that it was rational to impose the harm.<sup>381</sup> This idea is consistent with both Justice Stevens's and Justice Marshall's approaches, as well as with the central idea of proportionality.

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<sup>377</sup>. 397 U.S. at 520 (Marshall, J., dissenting); *see also Rodriguez*, 411 U.S. at 109 (Marshall, J., dissenting) (rejecting the majority's suggestion that "a variable standard of review would give this Court the appearance of a 'super-legislature,'" because such an approach is a necessary "part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document").

<sup>378</sup>. *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). For responses to Justice Stevens's approach, see James E. Fleming, "*There Is Only One Equal Protection Clause*": *An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006); and Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

<sup>379</sup>. 457 U.S. 202 (1982).

<sup>380</sup>. *Id.* at 223-24.

<sup>381</sup>. For contemporary treatment of *Plyler*, most generally favorable, see, for instance, Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITTS. L. REV. 409, 409 (1983) (calling *Plyler* "a significant advance in constitutional jurisprudence"); and Leading Case, *Right of Illegal-Alien Children to State-Provided Education*, 96 HARV. L. REV. 130, 134 (1982) (rejecting the dissenting position but criticizing the majority for a lack of clarity on whether it was status as undocumented children or the fact that education was involved that led to heightened scrutiny). *See also Michael J. Perry, Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond, Plyler v. Doe*, 44 U. PITTS. L. REV. 329 (1983) (describing the case as providing the correct answer to a political-moral problem but questioning its theoretical basis in the equal protection clause).

As noted earlier, disproportionality in the effects of laws, especially where laws have particularly adverse impact on traditionally discriminated against groups, may be a signal of process failures tainted by prejudices.<sup>382</sup> It may reflect a “deliberate indifference” that is a close cousin to more active forms of prejudice.<sup>383</sup> Rather than relying on tiers of review as on-off switches indicating when reasons must be more substantial, courts might view disparate impact on historically disadvantaged groups (especially if less harmful alternatives towards the asserted goals exist), as signalling a potential process failure requiring higher levels of justification.<sup>384</sup>

Indeed, the rigidly separated “tiered” standards of review may have led to the narrowed understanding of the substantive scope of the Equal Protection Clause in *Washington v. Davis*.<sup>385</sup> Although some have suggested that U.S. con-

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<sup>382.</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387-88 (1987) (arguing that “the cultural meaning of governmental actions with racially discriminatory impact is the best way to discover the unconscious racism of governmental actors”); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 587 (1977) (arguing that the burdens of a law falling disproportionately on minorities may be a sign that the government is “not as sensitive to the interests of racial minorities as to majoritarian interests”); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

<sup>383.</sup> “Deliberate indifference” is the standard used to evaluate claims that refusals or failures to protect prisoners against substantial risks of serious harm, or to provide prisoners with appropriate medical treatment for serious illness or injury, violate the Eighth Amendment’s ban on “cruel and unusual” punishments. See *Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). For a discussion of “deliberate indifference” in the context of equal protection, see generally Derek W. Black, *The Contradiction Between Equal Protection’s Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533 (2006).

<sup>384.</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); cf. Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983) (advocating a less stringent intent requirement in antidiscrimination law). Ely was concerned primarily with identifying invidious motives. He rejected arguments for judicial review of legislation distributing benefits not constitutionally required in the absence of invidious purpose; indeed, he rejected arguments that disparate impact alone could violate the Equal Protection Clause. ELY, *supra* note 122, at 136-45. If one believes that government has an obligation to deal impartially with its citizens, however, a substantially disparate impact on a traditionally disadvantaged group, if insufficiently justified, might itself evince an invidious denial of the impartiality to which the Equal Protection Clause aspires. See Barbara J. Flagg, “Was Blind But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing that legislators may unconsciously rationalize and legislate in a way that results in disproportionate adverse impact on racial minorities).

<sup>385.</sup> See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that a law, “neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another”). “Disproportionate impact[,] . . . [s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny.” *Id.* (citation

stitutional law is generally oriented towards the prohibition only of intentionally violative acts,<sup>386</sup> this is not a sufficient explanation for *Washington v. Davis*. At that time, as the Court noted, “there [were] some indications” in the Court’s own case law that intent was not the critical factor in making out Fourteenth Amendment violations.<sup>387</sup> As the Court also indicated, various courts of appeals had treated disparate impact alone as triggering heightened scrutiny<sup>388</sup>: such court of appeals decisions, the Court fair-mindedly said, “impressively demonstrate that there is another side to the issue”<sup>389</sup> within the existing interpretive resources of U.S. constitutional law.

An important element in the Court’s interpretation of equal protection law was its concern that allowing equal protection claims “based solely on [a] statistically disproportionate racial impact” would have sweeping effects on a wide range of important laws.<sup>390</sup> For example, the Court wrote, such jurisprudence might eliminate “various provisions of the Social Security Act” and “a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”<sup>391</sup> For the Court, “acceptance of appellants’ constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treat-

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omitted). Disparate impact analyses under statutes like Title VII of the Civil Rights Act of 1964, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), have survived. *But see Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (raising the question of whether disparate impact liability under Title VII violates constitutional equality guarantees).

<sup>386.</sup> See COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 64-78, discussed *infra* note 395 and text accompanying *supra* notes 315-326.

<sup>387.</sup> *Washington v. Davis*, 426 U.S. 229, 242-43 (1976); *accord Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 265 (1977) (noting “contrary indications . . . from some of our cases” to the rule of *Washington v. Davis* that that “[p]roof of racially discriminatory intent or purpose is required” to make out an Equal Protection Clause violation). The Court also discussed other of its own precedents to support the view that the Equal Protection principle was concerned only with discriminatory purpose. *Davis*, 426 U.S. at 239-41.

<sup>388.</sup> *Davis*, 426 U.S. at 244 (noting that courts of appeals had “held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications”).

<sup>389.</sup> *Id.* at 245.

<sup>390.</sup> *Id.* at 240, 248.

<sup>391.</sup> *Id.* at 240-41, 248. *But cf. Perry*, *supra* note 382, at 566 (arguing that the Court’s “parade of horrors” will not necessarily result from giving more weight to disparate impact in equal protection law).

ment might be.”<sup>392</sup> Thus, it concluded, “[d]isproportionate impact . . . [s]tanding alone” does not trigger strict scrutiny.<sup>393</sup>

It seems clear that the Court did not reach its conclusion because it thought racially disproportionate effect was of no concern; disparate impact was “not irrelevant.”<sup>394</sup> Motivating the decision in *Washington v. Davis* in important part were the remedial consequences for a broad range of statutes under the then-usually fatal “strict scrutiny” tier.<sup>395</sup> Given the categorical structure of two-tiered review that existed when *Washington v. Davis* was decided, this concern is understandable: intermediate scrutiny had not yet been identified at this time.<sup>396</sup> With the Court’s decision in *Personnel Administrator of Massachusetts v.*

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<sup>392</sup>. *Davis*, 426 U.S. at 240-41 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972)).

<sup>393</sup>. *Id.* at 242.

<sup>394</sup>. *Id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). In *Davis*, for example, the Court expressed its agreement with the district court that the use of the test could not be regarded as a purposeful form of discrimination, given the successful efforts of the government to recruit and hire more African-Americans into the Department. *Davis*, 426 U.S. at 246 (“Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general . . . and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that ‘a police officer qualifies on the color of his skin rather than ability.’” (quoting *Davis v. Washington*, 384 F. Supp. 15 (1972))).

<sup>395</sup>. But cf. COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 66 (viewing U.S. constitutional law as a whole as “an intent-based [system] . . . [that] construes the Constitution and judiciary as the mechanisms for striking down wrongly motivated actions”). As noted earlier, *supra* note 317, Cohen-Eliya and Porat acknowledge some exceptions, not only for a “consequentialist constraint” in an otherwise deontologically oriented system,” *id.* at 72, but also where there is state “indifference” to effects, as in the dormant commerce clause case law, *id.* at 74-75. The willingness to consider “indifference” in dormant commerce clause but not in race- or gender-based equality claims suggests that more is going on than a supposed aversion to effects-based tests can account for. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (holding that indifference to adverse impacts on historically disadvantaged groups ordinarily does not trigger heightened review for equal protection violations). U.S. constitutional law does not so generally focus on “intent,” see text accompanying *supra* notes 316-325, as to make implausible the idea that something more was at the root of the *Washington v. Davis* rule.

<sup>396</sup>. See Note, *supra* note 378, at 1147 (describing how, until 1976, there was only two-tiered review). The Court did not adopt intermediate scrutiny for gender classifications until *Craig v. Boren*, 429 U.S. 190 (1976), decided in December, 1976, six months after *Washington v. Davis*. Many statutes at the time would presumably have had some adverse impact based on race – because of links between race and poverty and, possibly, because of the exclusion of African Americans for most of the prior century from full participation in the elections of lawmaking bodies.

*Feeney*,<sup>397</sup> the gap between strict scrutiny for facial uses of race (or intermediate scrutiny for gender classifications) and rational basis review for facially neutral laws with known disparate impacts widened.<sup>398</sup>

Some of the Court's recent cases have moved away from reliance on rigid tiers, without clearly indicating what is in its place.<sup>399</sup> A standard focused not only on the nature of the classification but also on the relative nature of the harm complained of and its relationship to the particular government interests at stake would allow courts the flexibility to hold legislatures accountable without invalidating most legislation. Such a change in approach would help answer critiques of the Court's position on disparate impact. Failing to recognize disparate impact obscures some invidiously motivated conduct that does take place, and does not recognize the constitutional harm to equal protection of the law that can result from unconscious bias or from deliberate indifference to the situation of minority groups by members of more privileged groups.<sup>400</sup> A more flexible standard for reviewing equal protection claims could treat disparate impacts differently from overt or intentional uses of race, without suggesting that disparate impact on a racial minority group, or other historically discriminated-against group, creates no greater constitutional concern than distinctions between businesses for tax purposes.

More specifically, the use of neutral criteria, claimed to have a disparate impact on already disadvantaged groups, need not be treated as presumptively unconstitutional in order to require some real scrutiny of the reasons for the practice under a single standard of review. Rather, a substantial "disparate" impact on a minority group long subject to discrimination might be viewed as a signal of a possible process failure, reflecting the operation of unconscious bias or deliberate indifference. Such a finding might be viewed as requiring—not the kind of scrutiny that overt uses of race require—but some degree higher than that applied to challenges to economic legislation that is not claimed to impair fundamental rights or rely on suspect classifications.<sup>401</sup> Indeed, similar

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<sup>397.</sup> 442 U.S. 256 (1979) (holding that a knowing use of a preference for veterans, despite its very substantial adverse effect on women, did not require more than rational basis review; only if such a neutral criteria is used "because of" the adverse effects on gender is heightened scrutiny appropriate).

<sup>398.</sup> See, e.g., Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11–20 (2013).

<sup>399.</sup> See *supra* notes 151–152 and accompanying text.

<sup>400.</sup> See Flagg, *supra* note 384; Siegel, *supra* note 384.

<sup>401.</sup> Where a disparate impact falls on a group whose long history of persecution gave rise to the decision to treat the classification as suspect or quasi-suspect, courts might ask whether the challenged law or practice was adopted because of deliberate indifference to the effects on a racial minority group, or on women. If so, some appropriately deferential form of proportionality review (analogous to some form of intermediate scrutiny, sensitive to the magni-

elements were proposed in the scholarly literature in the decades after *Washington v. Davis* was decided.<sup>402</sup>

Experience elsewhere has demonstrated that the burdens of justification, when significant disparate effects on a group historically the subject of discrimination trigger heightened scrutiny, are not necessarily fatal or even that difficult to meet. In the European Court of Justice (now the Court of Justice of the European Union), violations of an anti-discrimination rule may arise from facially neutral policies which have the “effect” of treating women and men differently.<sup>403</sup> Under this quasi-constitutional standard for “indirect discrimination,”<sup>404</sup> the European Court entertains challenges to neutral employment practices with disproportionate adverse impacts on women, including in evaluating wage scales providing lower hourly wages to part-time workers than to full-time workers,<sup>405</sup> or in requiring minimum periods of full-time work to establish eligibility for pensions.<sup>406</sup> In such cases the European case law took into

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tudes of harmful as well as beneficial effects of the challenged law) could evaluate whether the practice was justified notwithstanding its disparate effects. See *infra* notes 417-418.

**402.** See, e.g., Karlan, *supra* note 384, at 124-30 (arguing for a broader understanding of intent, to include action with knowledge or reckless disregard of the disparate impacts of a law, with a slightly less demanding justification requirement); Perry, *supra* note 382, at 560 (arguing that disparate impact should require analysis of the degree of disproportionate impact, the public and private interests at stake, and the fit of the statute to its legitimate goals, without requiring either a “compelling” government interest or the precision of fit contemplated by the Court’s narrow tailoring requirements); see also Flagg, *supra* note 384, at 391-96 (proposing a form of disparate impact review that would permit the government to justify policies with disparate impact on showing less than “compelling” interest). A common thread is an effort to afford a level of judicial scrutiny greater than rational basis and less than strict scrutiny to laws that have disparate impacts based on race. See also Strauss, *supra* note 382, at 935 (arguing that the discriminatory intent standard is useful but that *Washington v. Davis* erred in making it the exclusive standard for establishing Equal Protection violations).

**403.** Olivier De Schutter, *Three Models of Equality and European Anti-Discrimination Law*, 57 N. IR. LEGAL Q. 1, 9-13 (2006) (discussing the development of the European Court of Justice’s disparate impact doctrine in the context of discrimination on the basis of gender); see also SANDRA FREDMAN, *DISCRIMINATION LAW* 181-82 (2d ed. 2011).

**404.** On the differences between “direct” and “indirect” discrimination in EU law, see EVELYN ELLIS & PHILIPPA WATSON, *EU ANTI-DISCRIMINATION LAW* 143-55 (2d ed. 2012). Although it is true that Title VII allows disparate impact litigation, this statutory cause of action is arguably more limited (for example, by requirements that challengers show not only a disparate impact, but also linkages between the specific practice and the alleged disparate effect) than that of the comparable line of cases brought under the quasi-constitutional European Union provisions. See Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT’L L. 115, 138-49 (2010).

**405.** See, e.g., Case 96/80, Jenkins v. Kingsgate (Clothing Prods.) Ltd., 1981 E.C.R. 911; see also ELLIS & WATSON, *supra* note 404, at 148-51.

**406.** Case 170/84, Bilka – Kaufhaus GmbH v. Karin Weber von Hartz, 1986 E.C.R. 1607. In *Bilka*, a challenge was brought by a female part-time employee who argued that the re-

account that women are disproportionately part-time workers and required employers to provide specific justifications for the exclusion of part-time workers from higher wages or other benefits; this justification ensured that there was no purpose of discriminating against women and that the discriminatory effects were justified as needed for legitimate economic purposes.<sup>407</sup> Once a disparate impact on women (over-represented as part-time workers) is proven, the employer has the burden of showing that the difference in treatment satisfies the principle of proportionality.<sup>408</sup>

In the *Danfoss* case,<sup>409</sup> the European Court held that a criterion of “mobility . . . to reward the employee’s adaptability to variable hours and varying places of work,” could “work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly.”<sup>410</sup> The mobility-

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quirement amounted to pay discrimination based on gender, since women were more likely to be part-time workers.

<sup>407.</sup> See *Bilka*, at 1627-28 (finding infringement of EEC Treaty Article 119 by a “company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the [company] shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex . . . [and] that the measures chosen by [the company] correspond to a real need on the part of the [business], are appropriate with a view to achieving the objectives pursued and are necessary to that end”; if such a showing is made, then “the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119”).

<sup>408.</sup> On the burden of justification lying with the employer once a *prima facie* case of indirect discrimination is shown, see Case C-127/92, *Enderby v. Frenchay Health Auth.*, 1993 E.C.R. I-5535, which, like several other rulings, has since been codified in various Directives. See EL-LIS & WATSON, *supra* note 404, at 158-63. For reference to the EU approach as one of proportionality, see A.C.L. DAVIS, PERSPECTIVES ON LABOUR LAW 134 (2004); FREDMAN, *supra* note 403, at 180; Evelyn Ellis, *The Concept of Proportionality in the European Community Sex Discrimination Law*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 165, 167 (Evelyn Ellis ed., 1999). The tests articulated for implementing this principle of proportionality differ from those of the Canadian *Oakes* test, requiring a legitimate aim, and focusing primarily on the first two prongs of “means” analysis – rationality (or “appropriate with a view to achieving the objectives pursued”) and necessity (“necessary to that end”). See *supra* note 407 (quoting *Bilka*). (Some scholars argue that proportionality *stricto sensu* comes into play implicitly in how the two prongs are applied. IAN SMITH & AARON BAKER, EMPLOYMENT LAW 326 (11th ed. 2013).) My argument here is not that the *Oakes* doctrine should be applied to disparate impact claims in the United States, but rather that some form of review, beyond the most relaxed forms of “rational basis” review (and perhaps drawing in part from existing U.S. doctrine or from proposals made by Justices Marshall and Stevens), should be applied to test the constitutionality of laws with severe disproportionate impacts on historically discriminated against groups.

<sup>409.</sup> Case 109/88, Handels-og Kontorfunktionærernes Forbund i Danmark v. DanskArbejdsgiverforening acting on behalf of Danfoss 1989 E.C.R. 3199 [hereinafter *Danfoss*].

<sup>410.</sup> *Id.* ¶¶ 18-21.

related compensation criterion thus arguably violated the “principle” of EU law “that men and women should receive equal pay for equal work.”<sup>411</sup> Employers could seek to “justify the remuneration of such adaptability by showing it is of importance for the performance of specific tasks entrusted to the employee.”<sup>412</sup> By contrast, in the *Cadman* case the Court accepted that pay scales based on experience would ordinarily be regarded as justified, rejecting the argument that their disproportionate effect on women would require further justification (absent a showing that duration of experience was not in fact job-related in particular settings).<sup>413</sup> This EU case law suggests that a disparate impact standard, sensitive to the different social and life experiences of women and men, can be applied to existing laws without undue economic disruption.<sup>414</sup>

To the extent that equal protection violations in the United States were defined narrowly to focus on intent because of concerns about the risks of judicial intrusion on the existing legal structure,<sup>415</sup> experience elsewhere with a more proportionate, flexible set of inquiries in equality cases suggests that the risk may have been overstated.<sup>416</sup> *Washington v. Davis* led to a large gap between the

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<sup>411.</sup> CATHERINE BARNARD, EU EMPLOYMENT LAW 254 (4th ed. 2012); Vicki C. Jackson, *Review of Laws Having a Disparate Impact Based on Gender*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 130 (Vikram Amar & Mark Tushnet eds., 2008).

<sup>412.</sup> *Danfoss* ¶ 22.

<sup>413.</sup> See Case C-17/05, *Cadman v. Health & Safety Exec.*, 2006 E.C.R. I-9585; *Danfoss* ¶ 24.

<sup>414.</sup> Cf. Linos, *supra* note 404, at 144 (arguing that U.S. fears that employers would be forced to adopt quotas without a “specific practice” requirement under Title VII “have not materialized” from EU requirements to justify practices that disproportionately affect women). Recent case law in the European Court of Human Rights has embraced “indirect [effects-based] discrimination” as an appropriate analytic for claims of discrimination against Roma children, under the European Convention on Human Rights. See D.H. v. Czech Republic, D.H. and Others, Case 57325/00, 2007-IV Eur. Ct. H.R.; Martha Minow, *Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge*, 50 SAN DIEGO L. REV. 1 (2013).

<sup>415.</sup> The fear of large-scale invalidation of laws under strict scrutiny plainly was a factor—though not the only one—in *Washington v. Davis*. But *Feeney*, 442 U.S. 256 (1979), cannot be so easily explained. It was decided after “intermediate scrutiny” for gender classifications had been introduced. Under some form of proportionality review compatible with intermediate scrutiny, it should have been possible to say that the Massachusetts scheme gave too large a benefit to the overwhelmingly male group of “veterans,” who were the object of the statutory preference, and imposed too high costs on women, even in light of its important purpose. The “proportionality as such” test enables a court to evaluate the impact of neutral laws with disparate impacts and conclude that the degree of preference is too great, in light of its adverse impact on a historically disadvantaged group, even though a lesser degree of preference would be justified by the goal of recognizing the special sacrifices of veterans.

<sup>416.</sup> In addition to the EU case law discussed earlier, it bears noting that the equality provision of Canada’s Charter has been interpreted to prohibit both purposeful discrimination and discrimination in effect, *see, e.g.*, *Withler v. Canada* (Att’y Gen.), 2011 SCC 12, [2011] 1 S.C.R. 396, ¶ 35 (Can.), against groups defined by specific characteristics, including age, gender,

stringent standard of review of facial or intentional uses of race and the lax “rational basis” standard of review for laws having disparate impacts on minorities—a puzzling feature of U.S. equality law. Many aspects of contemporary equality law might be thought to be implicated by this distinction.<sup>417</sup>

Is it too late for U.S. constitutional equality law to reconsider *Washington v. Davis*, in light of experience elsewhere? Perhaps not.<sup>418</sup> A substantial disparate impact on historically discriminated-against groups could be treated as raising an inference of a prohibited motive (including “deliberate indifference”), which

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race, national origin, religion, physical or mental disability, and analogous characteristics like marital status. *See, e.g.*, Quebec (Att'y Gen.) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.). Despite this extensive catalogue of constitutionally protected classifications, the case law does not seem to have resulted in unbounded judicial interference with legislative decisions. *See, e.g.*, *Withler*, [2011] 1 S.C.R. 396 (Can.) (upholding age-related reductions in certain pension benefits); *Gosselin v. Quebec (Att'y Gen.)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (Can.) (upholding an age-based distinction in access to welfare benefits, accepting that it was easier for younger people to find employment than for older people); *cf. Quebec (Att'y Gen.) v. A*, [2013] 1 S.C.R. 61 (upholding the constitutionality of Quebec statutes distinguishing between those who are married or in a civil union, on one hand, and those in long term relationships, or “de facto” marriages, with respect to statutory obligations for division of property and support after dissolution of the marital relationship, notwithstanding claims that the scheme disadvantaged the financially weaker (typically female) partner); Newfoundland (Treasury Bd.) v. N.A.P.E. [Nfld. Ass'n of Pub. & Private Emps.], 2004 SCC 66, [2004] 3 S.C.R. 381 (Can.) (finding that a violation of Section 15 equality rights, from a decision to delay implementing a pay equity agreement for female workers, was “demonstrably justified” under Section 1 by a severe financial crisis).

417. The origin of the idea of “suspect” classes was in the historic misuse of race as a tool for prejudice against and subordination of racial minorities; that it was minorities being harmed lent support to “representation reinforcement” arguments for strict scrutiny. It was not until close to twenty years after *Washington v. Davis* that the original idea of “suspect” classes was fully and clearly converted into a principle against “suspect classifications,” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), shifting the principal concern of equality law from harm to members of subordinated racial groups to harm to anyone based on a racial classification. A possible reconciliation of *Adarand* with a change in doctrine allowing consideration of disparate impacts on traditionally disadvantaged groups is discussed *infra* note 418 and text accompanying notes 419-422, but space does not permit discussion of the full range of implications for U.S. equality law of making review standards more proportionate.
418. Disparate effects, identified by attention to serious disproportionalities, may be sufficient to show a bad purpose, but only under a broader version of what counts as an invidious purpose than required by *Feeney*, see *supra* notes 395, 397, 415. Since deciding *Washington v. Davis* and *Feeney*, the U.S. Court has also declared that “consistency” requires that overt uses of race claimed to burden non-minorities be reviewed under the same “strict scrutiny” standard applied to minorities. *See, e.g.*, *Adarand*, 515 U.S. at 224; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment). Were the constitutional significance of serious disparate impacts reconsidered, the existence of historic discrimination against racial minorities provides some basis to think that disparate impacts on those groups are more likely to reflect bad purpose (if not fully intended, then deliberately indifferent) than similar impacts on other groups.

could be rebutted on a showing less stringent than “strict scrutiny” but more rigorous than “rational basis.”<sup>419</sup> Although the Court now treats any overt use of race as subject to the same standard of review (whether challenged by majority or minority group members), there are arguably constitutionally relevant differences between the intentional use of race to classify persons and the use of neutral laws that are “race-consciously” designed toward some legitimate end.<sup>420</sup> Disparate impacts that adversely burden minority groups might be regarded as of greater constitutional concern than “disparate impact” harms to members of a majority—if not on a substantive theory of racial nonsubordination then on an evidentiary theory that such disparate impacts are likely to result from bias, whether conscious or not.<sup>421</sup> A more proportionate approach to equal protection could allow courts to probe laws with substantial disparate impacts on racial minorities or women under the more flexible standards proposed by Justices Marshall and Stevens.<sup>422</sup>

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**419.** See sources cited *supra* note 402. A more proportionate approach to reviewing equality claims might also uphold a wider range of affirmative action programs, designed to respond to disadvantages previously imposed by law on discrete minority groups identified by race. *Cf. Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (arguing that “racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those objectives,’” a standard between rational basis and strict scrutiny (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977))). It is, however, possible that some members of the Court would place so much weight on color-blindness as a constitutional value and on potential adverse consequences of affirmative programs that the standard of review would not affect their view on the outcome.

**420.** See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (opinion of Roberts, C.J.) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). For at least one Justice in the narrow majority, Justice Kennedy, it is the public use of racial criteria to classify individual persons, rather than purposive consideration given to race, that is of most concern. *See id.* at 782-83, 787-89 (Kennedy, J., concurring in part and concurring in the judgment) (indicating that classifying individual children by race for purposes of school assignment is prohibited, but that “race conscious” but facially neutral measures relating, for example, to school district lines is permissible).

**421.** See *supra* notes 417-418.

**422.** Whether such an approach should extend across equality law cannot be fully addressed here. Allowing disproportionate effects to be considered through more flexible standards in cases involving poor welfare recipients or schoolchildren (as in *Dandridge* or *Rodriguez*) might lead to calls for greater scrutiny of economic regulation of businesses, arguably at the core of “Lochnerism.” To some extent, this may already be happening through reliance on other parts of the Constitution (for example, under the Takings Clause with respect to land use regulation); the Supreme Court recently refused to rule out the possibility of a “takings” challenge to permitting taxes. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2602 (2013) (leaving open whether and when a “tax” [could] become[] ‘so arbitrary . . . that it was not the exertion of taxation but a confiscation of property’” (quoting *Brushaber v.*

### 3. *Criminal Sentencing*

In contrast to the remedial challenges of equality law and the exclusionary rule, proportionality could play more of a role in criminal sentencing without such complications.<sup>423</sup> Prior to the enactment of the Sentencing Guidelines in

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Union Pac. R.R. Co., 240 U.S. 1, 24–25 (1916)); *see also* Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1475 (2015) (reviewing RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014)) (questioning the stability of the bifurcated approach to review of economic regulation as compared to regulation of noneconomic personal liberties); *cf.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (treating the use of money in political campaigns as equivalent to “speech” subject to regulation only to “prevent corruption,” very narrowly defined). The Court’s increasingly aggressive protection of campaign spending might be viewed as the *Lochnerization* of the First Amendment. For early scholarly discussion, see Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 291 (1992). Moreover, to the extent that the *Lochner* problem involved the Court’s basic economic theory of the Constitution, *see, e.g.*, Choudhry, *supra* note 144, at 3, it would not be redressable at the level of a trans-substantive methodological choice between case-by-case proportionality or categorical rules.

Some scholars have argued that proportionality review would be a real improvement over the kind of “rational basis” review, amounting to “abdication” of judicial responsibility, found in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). Mathews & Stone Sweet, *supra* note 52, at 838–44. Justice Marshall’s suggestions that courts could distinguish the severity of the harm when the rights of the poor as compared with commercial enterprises are at stake, and could also distinguish the likely need for judicial checks on legislatures on behalf of more and less powerful groups, remain salient. Experience in Germany suggests that a proportionality approach sensitive to the nature of the interests affected might avoid the “*Lochner*-esque” risks of undue judicial intervention in economic regulation. *See KOMMERS & MILLER, supra* note 365, at 421, 425–39 (noting the German Constitutional Court’s use of “sliding scale” and proportionality-like criteria in resolving equal protection cases but doing so through varying “intensity” of review); Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 256–57 (1999) (noting that in the “field of economic legislation,” including “mass administration of welfare law,” the court “established a doctrine of area-specific legislative discretion,” by which “the Parliament is given much greater discretion than in the fields of criminal law, voting law and the law of qualification tests”); Edward J. Eberle, *Equality in Germany and the United States*, 10 SAN DIEGO INT’L L.J. 63, 110 (2008) (describing more relaxed standard for reviewing the proportionality of equality claims in socioeconomic sphere, except when the socioeconomic regulations have a “disparate treatment of essentially similarly situated groups,” for example, blue-collar and white-collar workers with respect to length of notice of termination); *see also supra* note 369. Eberle also notes that although the German Court applies more relaxed review to socioeconomic measures, unlike in the United States the German Court varies the intensity of review even for socioeconomic matters: review can be “quite intensive, mainly when the disparity between groups similarly situated is too large.” *Id.* at 118; *see also* KOMMERS & MILLER, *supra* note 365, at 421 (noting that in contrast to U.S. “rational basis” review, which “usually assumes a rational connection between classification and purpose,” the German “Constitutional Court places a heavy burden on the legislature to demonstrate such a connection,” creating an “enhanced rationality review”).

<sup>423</sup>. Federal courts historically did not exercise appellate review over the proportionality of sentences, *see Project, Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810,

the 1980s, there was very little appellate review of sentences in the federal system. Appellate review for compliance with the Guidelines was authorized on appeal by either the government or the defendant. Since 2005, when the Guidelines ceased to be mandatory, federal appellate courts have been authorized to review sentences for reasonableness.<sup>424</sup>

The Court has repeatedly considered the proportionality of death sentences and held them to be unconstitutional under the Eighth Amendment under various circumstances, as when for example, the crime was not intended to and did not result in death; but its non-capital case law has been parsimonious in reviewing prison sentences under the “gross disproportionality” standard.<sup>425</sup> Indeed, the Court’s Eighth Amendment case law on non-capital sentences for adult offenders is sparse. In *Weems v. United States*, the first case in which the Court found a punishment to violate the Eighth Amendment, the Court referred to that Amendment as embodying a “precept of justice that punishment for crime should be graduated and proportioned to offense.”<sup>426</sup> Although some

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855-56 & nn. 226 & 227 (1975); see also Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1251 (1997) (noting that before the Guidelines, sentences were “virtually unreviewable”), and thus perhaps did not develop legal sensibilities for identifying disproportionate sentences. Under the 1984 Sentencing Reform Act’s guideline regime and until *United States v. Booker*, 543 U.S. 220 (2005), federal judges’ sentencing discretion was highly constrained, see Am. Law Inst., Model Penal Code: Sentencing Report 116 (2003) (“[A]ll state guidelines systems locate much greater sentencing discretion with the judiciary [than the Federal Guidelines].”); appellate courts reviewing federal sentences focused on applications of the detailed, complex, administratively developed and generally binding “guidelines,” see Stith & Cabranes, *supra*, at 1266-70.

<sup>424</sup>. See *United States v. Booker*, 543 U.S. 220, 245, 260-65 (2005) (holding that the Sentencing Guidelines are only advisory and contemplating appellate review of federal sentences for reasonableness). On the history of federal appellate review of sentences, see Note, *More than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 952-58 (2014).

<sup>425</sup>. See *supra* note 44. Compare, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (finding the death penalty disproportionate for the rape of an adult), and *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (finding the death penalty disproportionate for the rape of a child), with *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding a life sentence for a defendant who was a habitual offender and stole goods worth less than \$300), and *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (upholding a mandatory life without parole sentence for possession of a substantial amount of cocaine, emphasizing that the Eighth Amendment does not require proportionality, it only forbids gross disproportionality) (*Kennedy*, J., concurring in part and concurring in the judgment), and *Ewing v. California*, 538 U.S. 11 (2003) (upholding a life sentence for recidivist offenses). Even in capital sentencing, the Court has been reluctant to conclude that appellate review for “proportionality” in the sense of consistency with others convicted of similar crimes is required by the Eighth Amendment. See *Pulley v. Harris*, 465 U.S. 37 (1984) (rejecting the claim that appellate proportionality review for consistency with other sentences is necessary for all death sentences).

<sup>426</sup>. 217 U.S. 349, 367 (1910); see *supra* note 43; see also *O’Neil v. Vermont*, 144 U.S. 323, 331 (1892) (rejecting a challenge to cumulative sentence for multiple offenses, but stating that

Justices have argued that the Cruel and Unusual Punishments Clause bans only particular methods of punishment and not excessive sentences,<sup>427</sup> majorities since *Weems* have found that it does ban severely excessive sentences. In *Solem v. Helm*,<sup>428</sup> the Court reaffirmed that the Eighth Amendment prohibits not only barbaric punishments, but also punishments that are disproportionate to the offense, holding unconstitutional a life without parole sentence imposed on a petty offense recidivist. In *Harmelin v. Michigan*, a majority of the Court, three of whose members emphasized that the Eighth Amendment encompassed only “a narrow proportionality principle,” refused to apply *Solem* to invalidate a mandatory life without parole sentence for possession of more than 650 grams of cocaine.<sup>429</sup> The case law suggests that while the proportionality of death sentences is subject to serious scrutiny, for non-death sentences of imprisonment the standard of “gross disproportionality” will rarely be met. Yet Canada, interpreting a very similarly worded provision in its Charter<sup>430</sup> and applying its own judge-made rule of “gross disproportionality,” has taken a harder look at criminal punishments. For example, in *R. v. Smith*,<sup>431</sup> the Canadian Court held

“[i]f the penalty were unreasonably severe for a single offense, the constitutional question might be urged” if the Eighth Amendment had been assigned as error and were applicable to the government involved); *id.* at 339-40 (Field, J., dissenting) (“The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.”); *cf. Pervar v. Massachusetts*, 72 U.S. (5 Wall.) 475, 480 (1867) (noting that the Eighth Amendment does not apply to the states, but going on to say in any event that “it appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this”).

<sup>427</sup>. See *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., joined by Scalia, J., dissenting); *Weems v. United States*, 217 U.S. 349, 382-413 (1910) (White, J., joined by Holmes, J., dissenting).

<sup>428</sup>. 463 U.S. 277, 284 (1983).

<sup>429</sup>. 501 U.S. 957, 997 (1991) (Kennedy, J., joined by O’Connor and Souter, J.J., concurring in part and concurring in the judgment). Two other Justices would have rejected *Solem*’s proportionality analysis altogether. See *id.* at 962-87 (Scalia, J., joined by Rehnquist, C.J.). Four Justices dissented. See also *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding, by a five to four vote, a mandatory life sentence for a property crimes recidivist).

<sup>430</sup>. Section 12 of Canada’s Charter of Rights and Freedoms provides: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c.11, § 12 (U.K.).

<sup>431</sup>. [1987] 1 S.C.R. 1045 (Can.). The Canadian Supreme Court characterized the Canadian approach as more restrictive than the U.S. case law at the time, in that only gross disproportionality, not mere excessiveness, could constitute a Charter Section 12 violation. In other cases, the Canadian Court has upheld mandatory minimum sentences; for serious offenses, see, for example, *R. v. Luxton*, [1990] 2 S.C.R. 711 (Can.) (life without eligibility for parole

that a mandatory minimum of seven years for all offenses involving the distribution of narcotics was grossly disproportionate because it applied regardless of distinctions in degrees of seriousness of the offense. The sentencing practices of some foreign nations,<sup>432</sup> international tribunals,<sup>433</sup> and some states,<sup>434</sup> suggest that a more just and consistent approach to sentencing would be possible with greater attention to the proportionality of the sentence in light of the offense, the offender, and the treatment of comparable offenses and offenders. Proportionality as an outer limit based on the offense severity, as well as proportionality as a form of comparability with similarly situated offenders, have widespread support in the scholarly literature.<sup>435</sup>

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for twenty-five years for first degree murder); *R v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3 (Can.) (life without eligibility for parole for ten years for second degree murder, in a case involving the mercy killing of defendant's severely disabled child); *R v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895 (Can.) (mandatory ten-year minimum prohibition on possessing firearms following a drug conviction, where an exception exists if firearms are essential for the defendant's being employed or for minimal sustenance activities); and *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 (Can.) (four-year minimum for manslaughter with a firearm, in a case involving a police officer in altercation with prisoner). For lesser offenses, see *R v. Goltz*, [1991] 3 S.C.R. 485 (Can.) (upholding seven days of imprisonment as a mandatory minimum for knowingly driving while prohibited from doing so based on a bad driving record).

<sup>432.</sup> See Note, *supra* note 424, at 967 & n.121 (noting the role of appellate review in constraining sentencing decisions in England and Germany).

<sup>433.</sup> See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\*, reprinted in 37 I.L.M. 999 (1998), art. 81.2 ("A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence . . ."); see also 2 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: The CRIMES AND SENTENCING 285 (2014) (discussing principles of equality, proportionality, and gradation of punishment in international criminal law).

<sup>434.</sup> See, e.g., SULLIVAN & FRASE, *supra* note 52, at 154-60 (summarizing state laws and discussing Illinois case law); *Conner v. State*, 626 N.E.2d 803 (Ind. 1993) (holding that a six-year sentence for distributing fake marijuana was constitutionally excessive compared to the three-year maximum for distributing true marijuana); *Best v. State*, 566 N.E.2d 1027 (Ind. 1991) (finding a twenty-seven-year habitual offender sentence unconstitutionally excessive under the state constitution in light of the conviction offense and nature of defendant's past record); *Mills v. State*, 512 N.E.2d 846 (Ind. 1987) (explaining that while proportionality analysis is not required under the federal Constitution, it is required under Indiana's constitution); *State v. Johnson*, 709 So. 2d 672 (La. 1998) (explaining circumstances in which a statutory mandatory minimum should be found constitutionally "excessive" so that the sentence should be below the minimum). With thanks to a paper by Lise Rahdert, Yale Law School, J.D. expected 2015, for bringing some of these cases to my attention.

<sup>435.</sup> See, e.g., SULLIVAN & FRASE, *supra* note 52, at 129-68. For an argument that proportionality should play more of a role in limiting punishment, regardless of the penological purposes of punishment, see Ristroph, *supra* note 66.

Judicial resistance to reviewing sentence lengths as purely subjective<sup>436</sup> is puzzling, as the availability of information on sentences for comparable offenses and offenders both within and outside of the jurisdiction provide objective anchors for gross disproportionality determinations based on treatment of others.<sup>437</sup> In two recent cases, the Court has drawn from its death penalty jurisprudence and more closely scrutinized juvenile life sentences. It has held that a life without parole sentence for non-homicide offenses violates the Eighth Amendment as applied to minors, because of their characteristics; it also held that a mandatory life without parole sentence for a homicide crime is impermissible for juveniles, because an individualized sentencing determination, like those required for adults in capital cases, is required before imposition of the most severe lawful penalty.<sup>438</sup> Whether these cases foreshadow a broader willingness to take a harder look at the constitutional proportionality of noncapital sentences is uncertain. Likewise uncertain is whether federal courts' growing familiarity with review of sentences for reasonableness will contribute to further development of constitutional standards of proportionality under the Eighth Amendment. There is reason to think, however, that both law and society would benefit from more real attention to the problem of grossly disproportionate prison sentences than has occurred to date.<sup>439</sup>

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<sup>436.</sup> See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980); Note, *supra* note 424, at 960-61 (describing the concerns of some federal appellate judges). William Stuntz raised the possibility of "a proportionality rule, requiring that the conduct criminalized be serious enough to justify the punishment attached to it," but concluded that a major difficulty would be the absence of a "nonarbitrary way to arrive at the proper legal rules," whether for reviewing sentences, or distinguishing traffic stops from other crimes for Fourth Amendment purposes. Stuntz, *supra* note 232, at 66, 73. Comparisons with other sentences for similar offenses and offenders is an objective way of ensuring one kind of proportionality; and while some comparative severity judgments may be contested, others are widely accepted: intentional violence, for example, is generally considered more severe than modest property crime. Appellate review of criminal sentences in other jurisdiction rebuts claims of necessary arbitrariness. See *supra* notes 431-434.

<sup>437.</sup> This point has been noted by members of the Court. See, e.g., *Ewing v. California*, 538 U.S. 11, 47-52 (2003) (Breyer, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 1019-20 (1991) (White, J., dissenting).

<sup>438.</sup> *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Interestingly, in *Graham*, Chief Justice Roberts wrote separately, arguing against any categorical rule against sentencing juveniles to life without parole in nonhomicide cases but agreeing that in the particular factual context of the crime, the age of the fourteen year-old defendant, and the severity of the sentence compared to what both the prosecutor and probation officer had recommended, the sentence was unconstitutionally excessive. 560 U.S. at 86-96 (Roberts, C.J., concurring in the judgment). Whether this case may presage a willingness to look more carefully at proportionality challenges to prison sentences for adults remains to be seen.

<sup>439.</sup> See NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 34-37, 68 (2014) ("Current incarceration rates [in the United States] are historically and com-

### C. Fragile Rights, Fragile Regimes

There may be a distinctive need for prophylactic rules either to protect a right that is particularly fragile or to protect the performance of particularly sensitive government functions.

It is widely believed that some rights are particularly sensitive to threats from the possibilities of enforcement and accordingly require prophylactic protection.<sup>440</sup> In the United States, First Amendment rights of freedom of speech are understood to have this kind of fragility, and various doctrines have developed, including overbreadth, that constitute departures from ordinary adjudicatory practice.<sup>441</sup> *New York Times Co. v. Sullivan*<sup>442</sup> can be understood in this way: perhaps it is not that there is a First Amendment right to be negligent in reporting adverse facts about a public official,<sup>443</sup> but that there is a First Amendment right to engage in robust critical discussion of such public figures. That right might be threatened if reporters' actions were adjudicated under only a negligence standard, and thus plaintiffs must show malice or reckless disregard for the truth – as a prophylactic rule.<sup>444</sup>

In other areas the First Amendment's reach has been narrowed by categorical rules, arguably reflecting some form of proportionality analysis behind the rule, and sometimes qualified by further categorical exceptions to the categorical rule. For example, the First Amendment has been interpreted to allow stat-

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paratively unprecedented. The United States has the highest incarceration rates in the world, reaching extraordinary absolute levels in the most recent two decades.”)

<sup>440.</sup> Cf. Scalia, *supra* note 16, at 1180 (arguing that a well-formulated rule provides more comfort to lower court judges who rely on it to enforce a correct, but unpopular position, a view having particular salience for speech).

<sup>441.</sup> See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (defending the First Amendment overbreadth doctrine on the grounds that “First Amendment interests are fragile interests”); *see also supra* note 265.

<sup>442.</sup> 376 U.S. 254 (1964).

<sup>443.</sup> Cf. Pierre N. Leval, Commentary, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988) (characterizing *Sullivan* as concerned primarily with threat of large money awards to press freedoms, not as hostile to judicial actions to vindicate private reputational interests injured by inaccurate reporting). *But cf.* Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 211 (arguing that the central significance of the case was its coming close to rejecting the possibility that there could be defamation of public officials concerning their governmental acts and its clear rejection of the constitutionality of the Sedition Act of 1798 by embracing the proposition that “false statements of facts . . . are apparently to be afforded constitutional protection”).

<sup>444.</sup> *New York Times*, 376 U.S. at 298 (Goldberg, J., concurring in the result) (“The prized American right ‘to speak one’s mind’ about public officials and affairs needs ‘breathing space to survive.’” (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941); *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

utes that ban “fighting words.”<sup>445</sup> The Court explained in *R.A.V. v. City of St. Paul* that fighting words do not entirely lack expressive content but could be prohibited based on aspects of the speech unrelated to their content that justify the limited restriction on speech.<sup>446</sup> (On the majority’s account, a statute singling out racist forms of fighting words fell within a “content-based” exception to the exception for fighting words.) For the concurring Justices, prohibiting hateful fighting words posed little threat to First Amendment values because the “expressive conduct . . . is evil and worthless in First Amendment terms.”<sup>447</sup> On either rationale, one can identify a categorical rule arguably resting on a relative evaluation of the harms from the speech and the harms from its prohibition.

Scholarly literature identifies distinctive U.S. doctrine protecting “hate speech” from punishment as an important aspect of the U.S. constitutional tradition.<sup>448</sup> I do not here address the correct constitutional treatment of hate speech regulations. I contrast the majority’s analysis in *R.A.V. v. City of St. Paul*,<sup>449</sup> which rested on a view that even “fighting words” had expressive value

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<sup>445</sup>. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (describing the statute for “punishing verbal acts” that it was upholding as “carefully drawn so as not unduly to impair liberty of expression,” and concluding that its application to the facts did not “substantially or unreasonably impinge[e] upon the privilege of free speech”).

<sup>446</sup>. 505 U.S. 377, 385-86 (1992).

<sup>447</sup>. *Id.* at 402 (White, J., joined by Blackmun and O’Connor, JJ., concurring in the judgment); *see also id.* at 416 (Stevens, J., concurring in the judgment) (“Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . ; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.”).

<sup>448</sup>. See, e.g., Roger Errera, *The Freedom of the Press: The United States, France, and Other European Countries, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 63 (Louis Henkin & Albert J. Rosenthal eds., 1990); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 252 (2011).

<sup>449</sup>. *R.A.V.*, 505 U.S. at 391-92, 399-400 (denying that “fighting words” have at most a “*de minimis*” expressive content, arguing that the hate speech ordinance at issue involved both “content” and “viewpoint” discrimination, and explaining that the “point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content”). The Court distinguished the ordinance from others, like the statute specially protecting the President from threats, *see id.* at 388 (asserting that threats only against the President can be criminalized because “the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President”), but without clarifying why that logic did not uphold the hate-speech ordinance. *See id.* at 408 (White, J., concurring in the judgment) (arguing that this exception “swallows the majority’s rule. Certainly, it should apply to the St. Paul ordinance, since ‘the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination]’” (quoting

and that the ordinance was a “content-based” or “viewpoint-based” regulation of speech, with a Canadian case analyzing a similar issue through proportionality analysis. In *R. v. Keegstra*, the Canadian Supreme Court upheld a statute making it a crime willfully to engage in public speech calculated to bring hatred upon a group defined by race, color, ethnicity, or religion.<sup>450</sup> The justices were sharply divided on the outcome, but the majority and dissenting opinions all applied proportionality analysis and addressed the same questions in the same sequence. The dissenting opinion, while agreeing with the majority that the statute had a pressing and substantial objective, argued primarily that it did not minimally impair free speech values (noting the risks of its misapplication and the severity of a criminal sanction), while also questioning the statute’s rationality and proportionality as such (noting its potential chilling effects and the possibility that criminal prosecutions would draw more attention and support to the racist views).<sup>451</sup> Both majority and dissent in the Canadian case gave substantial weight to the special harms of hateful speech based on race or religion in ways that went well beyond the U.S. Court’s brief mention of the reprehensibility of the cross-burning in *R.A.V.*<sup>452</sup> As the competing opinions in *Keegstra* suggest, the issue is one on which there are powerful arguments on both sides.

As Mark Tushnet has suggested, the U.S. Court may be hesitant to recognize exceptions to the general rule against content-based regulation because of

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*R.A.V.*, 505 U.S. at 388 (majority opinion)). For further discussion of these two cases, see Jackson, *supra* note 79, at 611-16.

<sup>450</sup>. [1990] 3 S.C.R. 697 (Can.). All of the justices agreed that the statute infringed on Section 2 protections of freedom of expression; they disagreed on whether, under Section 1 of the Charter, the statute was “demonstrably justified” under the *Oakes* proportionality test.

<sup>451</sup>. *Id.* at 718, 758 (majority opinion); *id.* at 851-63 (McLachlin, J., dissenting). Later Canadian case law distinguishes between exposing groups to hatred and exposing them to ridicule, permitting sanctioning of the former but not the latter. *See* Sask. Human Rights Comm’n v. Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467 (Can.).

<sup>452</sup>. *See Keegstra*, [1990] 3 S.C.R. at 718, 758; *id.* at 861 (McLachlin, J., dissenting). By contrast to both the majority and the principal dissent in *Keegstra*, *see, e.g.*, [1990] 3 S.C.R. at 746-47 (Dickson, C.J.) (“The derision, hostility and abuse encouraged by hate propaganda . . . have a severely negative impact on the individual’s sense of self-worth and acceptance [and] may cause target group members to take drastic measures in reaction . . . .”); *id.* at 812 (McLachlin, J., dissenting) (“The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. . . . [I]t may threaten social stability.”), the *R.A.V.* Court failed to discuss the harms at which the municipal law was aimed until late in the opinion, and did so only briefly. *See* 505 U.S. at 395-96 (noting that there are compelling interests in assuring the basic human rights of discriminated-against groups to live in peace and that burning a cross in someone’s yard is reprehensible, but asserting that the state has other means to prohibit it); *see also id.* at 392. In so doing, it arguably failed adequately to address the reasonable concerns of those on the losing side. *See supra* note 228.

a “fear” of judgment.<sup>453</sup> Courts cannot, however, escape judgment; they can sometimes obscure the character of their judgments through nonpurposive extensions of rules, as arguably has occurred in several areas of First Amendment law.<sup>454</sup> Structured proportionality analysis can help make more transparent the arguments for and against recognition of further categories of analysis of First Amendment claims. The Canadian opinions suggest that, to the extent the First Amendment is construed to prohibit even narrowly drawn hate speech statutes, it should not be because such expression is somehow viewed as having more value than obscene speech, or fighting words in general, but because of the risks of misapplication that such statutes historically present.<sup>455</sup>

This piece has for the most part focused on constitutional rights. But just as prophylactic rules are sometimes necessary to protect unusually fragile rights, prophylactic rules may also be designed to protect important government functions. Many such rules exist.<sup>456</sup> Immunity for judges from civil liability for their adjudicatory acts, which is an absolute immunity under federal law, is famously justified on the basis that without it the costs of defending nonmeritorious suits would be too high, and fear of lawsuits would threaten judicial independence.<sup>457</sup> Qualified immunity rules have been justified as necessary to

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<sup>453.</sup> Tushnet, *The First Amendment*, *supra* note 251, at 105–06.

<sup>454.</sup> See *supra* notes 252–258 and accompanying text (noting Tushnet’s critique of decisions in *Snyder v. Phelps* and *United States v. Stevens*).

<sup>455.</sup> Such regulation could be viewed as sufficiently neutral if it applied to the fomenting of hatred directed against any racial or religious group, not designed to favor or protect only one side in racially charged conflicts. *But see R.A.V.*, 505 U.S. at 391–92 (treating a hate speech statute directed at racial and religious groups as viewpoint-based because it did not prohibit hate speech against those who preached tolerance). There may, however, be institutional reasons, not present in Canada, in the more decentralized criminal justice and court systems of the United States to limit exceptions to the presumptive ban on content-based regulation. See Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-Ian Freedoms*, 58 U. MIAMI L. REV. 265, 316–17 & n.108 (2003).

<sup>456.</sup> For example, filing deadlines for appealing from trial court decisions both limit access to judicial review and, in another sense, make judicial review possible by providing for an orderly process of review.

<sup>457.</sup> See *Stump v. Sparkman*, 435 U.S. 349 (1978); *Yaselli v. Goff*, 12 F.2d 396, 399 (2d Cir. 1926) (“A defeated party to a litigation may not only think himself wronged, but may attribute wrong motives to the judge whom he holds responsible for his defeat. . . . To allow a judge to be sued in a civil action on a complaint charging the judge’s acts were the result of partiality, or malice, or corruption, would deprive the judges of the protection which is regarded as essential to judicial independence.”); *see also Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.) (“[A]n official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the

protect officials' ability to function.<sup>458</sup> Such general categorical rules, designed to protect the government's ability to carry out functions that could be jeopardized by intrusive remedies, might well be upheld through structured proportionality analysis notwithstanding their adverse effects on rights-remediation. Consider these questions from structured proportionality analysis: is the goal of protecting officials from the predictable effects of suits, most of which are nonmeritorious, a substantial one? Most would say yes. Is the provision of a high degree of immunity a rational means towards doing so? Plainly yes. But do the means "minimally impair" the rights of those who claim officials have acted unlawfully? This is a closer question, depending on empirical estimates of the effects of different forms of protection that might shift over time.<sup>459</sup> Finally, application of immunity rules would probably be found proportional in all but the most unusual of cases, because to freely make exceptions would undermine the protective purpose of the rule.

## CONCLUSION

Embracing proportionality as a principle does not necessarily support its doctrinal use in all areas of adjudication.<sup>460</sup> Proportionate justice concerns

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guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."). Immunity from all or most civil damage actions is widespread in constitutional systems with independent judiciaries. *See generally* JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed., 2012) (exploring elements of judicial independence in several systems).

**458.** See *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) (stating that qualified immunity rests on "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability"); *see also* *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982) (explaining its departure from the "good faith" definition of immunity to an "objective" definition in order to protect officials from burdens of litigation). Absolute immunity is even more rule-like, entirely insulating officials from constitutional tort actions related to certain forms of official conduct, such as criminal adjudication or prosecution. *See supra* note 457. The Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964), explicitly invoked *Barr v. Matteo*, 360 U.S. 564 (1959), a then-recent case extending an immunity to civil servants sued for common law libel.

**459.** *See, e.g., Harlow v. Fitzgerald*, 457 U.S. at 815-19.

**460.** Proportionality plays a role, both in the United States and elsewhere, as an element in analyzing constitutional questions of federalism. Although some dormant commerce clause cases can be conceptualized as about the rights of out of state goods, services, businesses, or persons and thus analogous to equality claims, there are dormant commerce clause cases that appear to be less about discrimination and more about burdens. *E.g.*, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). Proportionality may play a quite different role in these two kinds of cases, and a different role again in measuring contests between central government and subnational government powers. In horizontal structural issues—in the U.S. called "separation of powers"—whether the concept of proportionality has any role at

could, in some areas, lead to categorical rules rather than to contextualized case-by-case determinations. Using proportionality to define violations, of course, does not dictate remedies or exclude definitions of rights based on separate deontological or historical questions. However, greater use of proportionality, as a principle and as a structured form of review, has several potential benefits. It could enhance judicial reasoning by clarifying justifications for limitations on freedoms. Proportionality might also improve the outcomes of adjudication by bringing U.S. constitutional law closer to (admittedly varied) U.S. conceptions of justice, in ways consistent with the demands of effective government. Finally, proportionality may be democracy-enhancing, both in providing a shared discourse of justification for action claimed to limit rights and in providing more sensitivity to serious process-deficiencies reflecting entrenched biases against particular groups.

Justice Scalia has famously argued that the rule of law is a law of rules.<sup>461</sup> But sometimes the rule of law requires attention to the “reasonableness” of conduct. Sometimes considerations of degree will bear on the formulation of a categorical rule in ways that the questions of proportionality analysis can help answer. If we are proportional in our application of proportionality, we may be able to improve much criticized areas of constitutional law while retaining an important role for presumptive categorical rules. Expanding existing proportionality review of criminal sentences would bring more justice to the criminal justice system. In equality case law, the Court’s definition of the constitutional right as excluding injuries to minorities from “disparate impacts” of neutral laws may have resulted from fear of applying the usually fatal “strict scrutiny” test;<sup>462</sup> it might be reconsidered in light of case law from other jurisdictions involving more proportionate approaches to defining the violation. Asking the “proportionality as such” question might clarify and strengthen the “compelling interest” test used in some First Amendment areas. Where the Constitution itself uses “reasonableness” as a criterion, as in the Fourth Amendment, embracing proportionality in place of some of the more categorical existing approaches offers substantial benefits.

Consider *Atwater* again: if there were no less rights-impairing alternative that as effectively advances legitimate law enforcement interests, and if the harm to protected constitutional rights were outweighed by the need to advance those law enforcement interests, then a categorical investigatory rule could be upheld. An opinion following the Canadian approach, though, would

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all to play would take considerable reflection. See Jackson, *supra* note 225, at 843–47 (discussing proportionality and structural constitutional issues). For these reasons, this paper has focused primarily on proportionality doctrine in the adjudication of individual rights cases.

<sup>461</sup>. See *supra* notes 16, 307.

<sup>462</sup>. See *Washington v. Davis*, 426 U.S. 229 (1976).

take fuller account of the individual's constitutional rights claim than did the *Atwater* Court. In so doing, the Canadian approach might well be more convincing than opinions that focus primarily on *authority* for the law enforcement action, rather than the reasons for it. Unlike trial courts' decisions, police officers' decisions made in their daily interactions with citizens are highly unlikely to be redressable through the means of subsequent review. Further, when police officers accustomed to unreviewable exercises of discretion make unnecessary arrests or commit gratuitous violence, the harm to the subjects of police abuse—as well as to respect for the rule of law—can be high.<sup>463</sup>

Perhaps the Court's decision in *Atwater* could be viewed as a form of empirical humility about the presumed expertise of police as compared to courts. Perhaps it could be regarded as manifesting respect for democratic federalism, notwithstanding case law treating authority under state law as irrelevant.<sup>464</sup> At the same time, given very high incarceration rates in the United States and evidence that the criminal justice system falls with greater severity on members of already disadvantaged groups,<sup>465</sup> it is by no means clear that law enforcement officers need more, rather than less, insulation from judicial review of the constitutionality of their actions.

Where the Constitution itself uses “reasonableness” as a criterion, as it does in the Fourth Amendment, the use of categorical rules that treat patently unreasonable conduct as constitutional does a disservice to the rule of law and fails to protect express constitutional values.<sup>466</sup> When the Constitution requires the vindication of such large-scale commitments as “equal protection of the laws,” or “due process of law,” embracing a more flexible, proportionality-based approach may better protect constitutional justice than will existing categorical approaches, by offering a check on governmental indifference or

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<sup>463</sup>. From reactions to 1) the Los Angeles Police Department's use of chokeholds in traffic stops, disproportionately killing African-American citizens in the 1970s and 1980s; 2) the Rodney King incident of the early 1990s; 3) the 1999 killing of Amadou Diallo in New York; and 4) the very recent death by police violence of an unarmed man in Ferguson, Missouri, these harms are apparent. See Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 161-74 & n. 155 (2014) (the Los Angeles Police Department's use of chokeholds and Rodney King); Edwidge Danticat, *Enough Is Enough*, NEW YORKER: CULTURAL COMMENT (Nov. 26, 2014), <http://www.newyorker.com/culture/cultural-comment/michael-brown-ferguson-abner-louima-police-brutality> [http://perma.cc/TG56-JU83] (Diallo and Ferguson).

<sup>464</sup>. See *supra* note 249.

<sup>465</sup>. Members of those groups most severely disadvantaged by race and class may not have the resources that Ms. Atwater found to bring her challenge.

<sup>466</sup>. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 373 (2001) (O'Connor, J., dissenting) (“The Court neglects the Fourth Amendment’s express command in the name of administrative ease.”).

blindness to acute harms caused to those less able to protect themselves in political processes. Incorporating concerns for proportionality across larger areas of constitutional law may also allow for more meaningful participation by all branches of government in the ongoing process of working the Constitution to achieve effective and human rights-protecting governance.<sup>467</sup>

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<sup>467</sup>. Cf. Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934) (discussing the “working Constitution”); *supra* text accompanying notes 234-245.