Proportionality and Democratic Constitutionalism

Stephen Gardbaum*


As scholarship on proportionality has taken a welcome normative turn in the last few years, some of its proponents have portrayed it as an essential part of a broader “culture of justification.”¹ Within this culture, as a condition of its legitimacy, all government action – and not only (in Rawlsian terms) the basic structure of society – must be justifiable in terms of public reason to the individuals burdened by it. Proportionality analysis provides the analytical framework for this required exercise in public justification. This account of proportionality tends to emphasize its strength as imposing a second set of constraints -- substantive in nature -- on government action in addition to the procedural requirement of political equality as manifested in democratically-accountable decision-making. In this way, these proponents argue that proportionality’s burden of justification is a necessary “second pillar” of constitutional legitimacy; democracy is not enough.²

* MacArthur Foundation Professor of International Justice and Human Rights, UCLA School of Law. An earlier version of this chapter was prepared for the symposium on proportionality at the University of Western Ontario in October 2010. Thanks to editors Grant Huscroft, Brad Miller, and Grégoire Webber for very helpful comments.

¹ The term originated with Etienne Mureinik in 1994, who contrasted it to “a culture of authority,” as a way of characterizing the aims of the new South African Constitution. “If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command.” Etienne Mureinik, “A Bridge to Where?: Introducing the Interim Bill of Rights,” (1994) 10 S.A.J.H.R. 31 at 32 [Mureinik, “A Bridge to Where?”]. See also David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture,” (1998) 14 S.A.J.H.R. 11 [Dyzenhaus, “Law as Justification”].
By contrast, critics of proportionality have emphasized its weakness rather than strength as a constraint on government action, particularly in the rights context. By placing constitutional rights on a par with governmental interests, engaging in “rights inflation” so that rights are ubiquitous but devalued, and reducing rights analysis to the purely quantitative and technical, critics claim that proportionality rejects the special normative force of constitutional rights and renders them inconsequential.3 For the critics, protecting rights only against disproportionate infringements is not enough. One strand within this general position additionally incorporates a democratic critique of proportionality: in granting courts the power both to specify the meaning and scope of abstractly-framed constitutional rights and to evaluate the justifiability of legislative limits on them, the rise and triumph of proportionality has been a central factor in the juridification or judicialization of contemporary constitutionalism.4

In this chapter, I propose an alternative normative perspective to the influential culture of justification from which to understand and evaluate proportionality. From this perspective, proportionality should primarily be understood as enhancing, not constraining, democracy. Rather than the constitutionalist legitimacy of democracy, proportionality is centrally about the democratic legitimacy of a constitutionalized rights regime and an appropriate balance between judicial and legislative powers. It is part of a conception of constitutional rights and of a rights regime that, in contrast with certain others, seeks to accommodate and temper enduring and legitimate democratic concerns. This conception is typically institutionalized through its characteristic textual vehicle of the limitations clause, which grants to legislatures significant

---


3 See text accompanying notes 14-19.

power and leeway in the resolution of rights issues. Accordingly, this alternative normative perspective can be thought of as promoting a “culture of democracy”. It also responds to the democratic critique of proportionality by showing how the very “weakness” its critics complain of forms the basis of a democratic justification for it. In short, I argue that the critics are mostly correct in their characterization of proportionality, but wrong that this undermines its normative appeal.

It will be clear that in presenting my culture of democracy analysis and case for proportionality, I am not attempting a fine-grained defense of the various prongs of the near-universal proportionality test. Nor am I defending any one specific version of proportionality over any other, or even proportionality versus other similar modes of constitutional balancing. Rather, I am seeking to present a more broadly-gauged conception and defense of a proportionality-like test for limiting rights (and of the conception of constitutional rights of which it is an inherent part) that is part and parcel of contemporary “strong-form judicial review.” In claiming that proportionality can and should be viewed through the lens of democratic constitutionalism, I am certainly not arguing that it is the only or best rights regime from this perspective. What I am suggesting is that a system of proportionality-based constitutional rights can be made less vulnerable to certain democratic critiques than alternative systems of strong-form judicial review, and that this should be taken into account in the normative debate about the merits of proportionality and, indeed, about institutional forms of constitutionalism more generally.

---

5 That is, where courts have the final word and their decisions are unreviewable by ordinary majority vote, by contrast with the newer forms of “weak-form” judicial review discussed in Part IV. Mark Tushnet introduced the helpful terminology of strong and weak-form judicial review. See Mark V. Tushnet, “New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries”, 38 Wake Forest L. Rev. 813 (2003); Mark V. Tushnet, Weak-Form Judicial Review: Its Implications for Legislatures, 23 Sup. Ct. L. Rev. 2d 213 (2004).
The first section of the chapter sets out the normative perspective of the culture of justification shared by certain recent proponents of proportionality, as well as the critique of it on the part of proportionality’s opponents. The second section presents the alternative perspective of the culture of democracy from which to understand and assess proportionality, including the normative case for proportionality that derives from it and the implications of this case for the exercise of judicial review. If, as I argue, proportionality can properly be viewed as one version of democratic constitutionalism, the final section broadens the picture by outlining the other major versions and offering some preliminary and tentative thoughts on their comparison and respective merits.

I. Proportionality and the Culture of Justification

Recent scholarship sympathetic to proportionality analysis as a near-universal feature of contemporary constitutionalism has tended to embed it – for explanatory or normative purposes – in a broader culture of justification. This culture consists in a general requirement that in order to be legitimate, all government action must satisfy a burden of public justification. It therefore imposes substantive – not only procedural or jurisdictional – constraints on government action, prohibiting as illegitimate laws and other conduct that fail this test of justification. The function of proportionality analysis is to provide the analytical framework for much of this required burden of justification. This standard of political legitimacy is more onerous than the conventional one in modern liberal political theory, because it applies a test of reasonable public justification not merely to the basic or constitutional structure of society, but to each and every action of government operating within that structure.
According to Moshe Cohen-Eliya and Iddo Porat, proportionality is an inherent part of a broader culture of justification, and it has been the profound switch towards this general culture and away from the contrasting “culture of authority” that helps to explain the spread and appeal of the proportionality principle. “At its core, a culture of justification requires that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e., in terms of proportionality.” By contrast, within the culture of authority that they argue characterizes the American constitutional model, legitimacy derives from the fact that the actor is authorized to act and constitutional law focuses on delimiting the borders of public action and in making sure that decisions are made by those authorized to make them. Within the bounds of its authority an institution is not regularly required to justify its actions, but merely to identify the legal source of its authority to act. For the culture of justification, however, authorization to act is a necessary but not sufficient condition for legitimacy and legality. In other words, this culture requires an additional or second stage of scrutiny for all government action, in which it must provide substantive justification in terms of public reason for what it has done. And this is the second way (the first being scope, or what needs to be justified) in which a culture of justification, of which proportionality is an inherent part, imposes stronger or more onerous constraints on government action.

Taking a more directly normative position on the issue, Mattias Kumm argues that proportionality is to be understood as part of a general requirement of substantive or outcome-
oriented justification that forms the “second leg” of constitutional legitimacy, in addition to the procedural commitment to political equality and majoritarian decision-making that flows from it. For Kumm, the point of judicial review is to institutionalize the practice of “Socratic contestation” that puts government action to the necessary test of public justification, so that its presence in a properly functioning constitutional democracy is essential. As he puts it,

Proportionality based judicial review institutionalizes a right to justification that is connected to a particular conception of legitimate legal authority: That law’s claim to legitimate authority is plausible only if the law is demonstrably justifiable to those burdened by it in terms that free and equals can accept.

Once again, this second dimension of legitimacy, of which proportionality provides the analytical framework, functions to strengthen the constraints on government action and make them more onerous. They must satisfy not only the procedural requirements of democracy but also the substantive burden of demonstrable public justification.

On the other side of the debate there is, of course, a longstanding general conception of rights that rejects the notion that they are only presumptive or prima facie claims, potentially overridable by conflicting public policy objectives. More specifically, there is an almost equally longstanding anti-balancing critique in the United States, where constitutional balancing is generally perceived less favorably, at least among legal academics, than it is elsewhere as the final part of proportionality analysis – although in practice American constitutional law remains firmly in the age of balancing. Within Europe, and Germany in

---


11 See, for example, Robert Nozick, Anarchy, State and Utopia (1974); Ronald Dworkin, Taking Rights Seriously (1977).

particular, Jürgen Habermas has been a well-known critic of balancing and proportionality for its alleged irrationality and subjectivity, and has fought several rounds with perhaps its major proponent, Robert Alexy.\textsuperscript{14}

But there has of late been a flurry of critiques by newer entrants to the debate as part of the recent general normative turn it has taken. The title of one of them, “Proportionality: An Assault on Human Rights?,”\textsuperscript{15} makes clear the main line of attack. The basic argument in this latest round of criticism is that far from imposing strong constraints on government action, proportionality it is too permissive and takes rights insufficiency seriously. Proportionality analysis is too weak because rights are (1) equated with, rather than given any sort of normative priority over, the public policy objectives that conflict with them; (2) reduced to interests to be quantified and optimized, thus losing their distinctive moral content; and/or (3) subject to merely reasonable, publicly justifiable limitations. In short, the culture of justification in effect becomes a culture of justifying rights inconsequentialism.

According to Grégoire Webber,\textsuperscript{16} there are three main counts in the indictment against proportionality. First, the attempt to depoliticize rights by purporting to turn the political and moral questions inherent in the process of rights reasoning into technical questions of weight and

\textsuperscript{13} As one among many examples of balancing in contemporary American constitutional law, see Hamdi v. Rumsfeld, 542 U.S. 507 at 532 (2004) (“striking the proper constitutional balance here [between the individual right to liberty and the government’s interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States] is of great importance to the Nation during this period of ongoing combat.”).


balance is futile, especially in the absence of a common criterion for evaluation. Second, by reducing constitutional rights to an interest or value to be optimized, proportionality does “violence to the idea of a constitution”\textsuperscript{17} in providing no strict demarcation against unacceptable state action. Third, in addition to its denial of the special normative force of rights, the “received approach” is democratically illegitimate in that it empowers courts rather than legislatures to specify the meaning and scope of abstractly-framed rights and to evaluate the proportionality of legislative “infringements” of rights.\textsuperscript{18} For Stavros Tsakyrakis,  

\begin{quotation}
[the balancing approach, in the form of the principle of proportionality, appears…to pervert rather than elucidate human rights adjudication. With the balancing approach, we no longer ask what is right or wrong in a human rights case but instead, try to investigate whether something is appropriate, adequate, intensive or far-reaching.\textsuperscript{19}]
\end{quotation}

Moreover, proportionality “erodes these [human] rights’ distinctive meaning by transforming them into something seemingly quantifiable.”\textsuperscript{20}  

Now, to some extent this opposite evaluation of proportionality can be explained by different objects or framings of the proportionality inquiry on the part of each side. Proponents sometimes frame the issue as the general one of the legitimacy of governmental action – what are its criteria and how should they be institutionalized – and not the more specific one of whether and when rights should be limitable by legislatures. Moreover, they also insist that “‘every’ governmental action is in need of justification, since justification rather than authority, is the main source of legitimacy,”\textsuperscript{21} and not only that sub-set of actions implication or limiting rights. Within this framing, proportionality is a principle that \textit{limits government action}. As part of a  

\textsuperscript{17} Webber, “The Cult”, \textit{ibid}. at 198.  
\textsuperscript{18} Webber, \textit{The Negotiable Constitution, supra} note 4 at 201-12.  
\textsuperscript{19} Tsakyrakis, “Proportionality: An Assault on Human Rights?”, \textit{supra} note 15 at 487.  
\textsuperscript{20} \textit{Ibid}. at 488  
\textsuperscript{21} Cohen-Eliya and Porat, “Proportionality and the Culture of Justification”, \textit{supra} note 6 at 477.
culture of justification, it imposes the substantive constraint that government action must be publicly justifiable to those it burdens. This view has its historical and conceptual roots in the general principle of the rule of law, where government action is not otherwise limited by specific constitutional rights or higher law of any kind. In this context, proportionality provides an inherent limit and functions to rebut a prima facie case for what the government has done. The general concept of proportionality originated in eighteenth century Prussian administrative law and the proponents’ position is structurally connected to the context of providing the only limit to otherwise substantively unlimited government action. This is the conception that T.R.S. Allan successfully and skillfully employed in the pre-HRA United Kingdom as part of the inherent constitutional limits provided by the rule of law even absent an express set of limits in the form of a general bill of rights.

By contrast, the critics focus squarely and uniformly on the more specific issue: what is being justified under proportionality analysis is government action that implicates constitutional rights. In this context, proportionality is a principle that limits constitutional rights and therefore empowers as least as much as it constrains governments. Their focus reflects the fact that proportionality changes its nature in the context of such a bill of rights. It now operates in the context of a prima facie case against, not for, the relevant government action – here of an infringement of rights. Once there are limits on government action in the form of constitutionalized rights, proportionality operates not only as a substantive limit on government action, but also as a limit on the limits to government action enshrined in such rights. This

---


change in legal context also changes the object of proportionality analysis: what is being justified under proportionality analysis is not simply (any and all) government action, but specifically government action infringing rights. Accordingly, proportionality is transformed when it applies to a set of constitutional rights rather than operating as a residual rule of law constraint on general government action. The key normative issue becomes less why government should generally be required to act proportionately than why government should be empowered to limit constitutional rights proportionately.

Ultimately, however, I do not think the difference between the two sides can be explained away in this manner. For one thing, although perhaps for some it is not the focus of their more general analysis, no proponent would likely deny that proportionality analysis should apply in the constitutional rights context, where it exists. It would be a seemingly implausible lacuna in a general theory of the legitimacy of law within contemporary liberal democracies for it not to apply to rights.24 Secondly, for those proponents who take German constitutional practice as the paradigm of proportionality analysis,25 its very broad conception of liberty and equality rights in particular means that there is less of a gap between all government action and rights-infringing action than elsewhere. Indeed, one such proponent, Kai Möller, argues that “rights inflation” of this sort is not merely compatible with but necessitated by proportionality and its underlying conception of a constitutional right.26 Just as there is no special normative distinction between constitutional rights and conflicting government interests, there is also none between (what in

24 Even those who believe proportionality is an administrative law principle and not a constitutional law one would likely accept that it applies to constitutional rights claims against administrative action, only not against legislative acts.

25 As seems to be the case with both Kumm, who uses German constitutional practice as an exemplar of what he refers to as the (European) “Rationalist Human Rights Paradigm (see Mattias Kumm, “The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review” 1 E.J.L.S. 1 at 28 (2007)), and Kai Möller in this volume.

26 Möller, ibid.
some other rights regimes are considered) an individual’s constitutional liberty rights and other lesser liberty interests. All interferences with individual autonomy, no matter how seemingly small or unimportant, trigger the duty of justification and its proportionality inquiry. And it is precisely these features of proportionality that its critics react to most strongly. For them, rights are special in both respects.

II. Proportionality and the Culture of Democracy

Whereas the culture of justification perspective views proportionality through the lens of whether or not it enhances the constraints on government action in the name of constitutional legitimacy or respect for individual autonomy, the culture of democracy perspective views proportionality through the lens of whether or not it enhances the specifically democratic legitimacy of a constitutionalized rights regime. It is a culture that puts democratic, not justificatory, goals at its center. Within this framework, the point of proportionality is to accommodate and temper certain enduring democratic concerns with judicially enforced higher law rights.

From this perspective, proportionality is an inherent part of the dominant contemporary conception of constitutional rights as not only having limits (that is, their force or scope is not absolute), but as limitable by the political institutions. This feature is typically highlighted and given explicit textual form by the limitations clause or clauses in a bill of rights. In other words, the second of the two steps of rights analysis, the step in which proportionality review is undertaken, incorporates the proposition that the political institutions are empowered to place limits on and ultimately override constitutional rights (as authoritatively interpreted by the judiciary) in the face of conflicting public policy objectives when the substantive criteria
provided by the relevant proportionality-like tests have been satisfied. Accordingly, the dominant general conception of a constitutional right should be understood as granting the political institutions a limited power to override judicially interpreted rights, and the “external” limits on rights provided by the proportionality test as a whole specify the parameters of this power.

Although this general conception of a constitutional right – of which balancing at the second stage is an inherent part – is very widely adopted among contemporary constitutional systems, it is not the only possible or available one. There are at least two alternative conceptions, both of which reject proportionality and balancing. The first, sometimes referred to as the immunity conception or “rights as trumps”, holds that where properly at issue and implicated, constitutional rights cannot be limited or overridden by non-rights claims at all. It was in contrast to this conception, and in the context of describing the structure of constitutional rights in the United States, that Fred Schauer referred to constitutional rights as “shields” rather than “trumps,” and this helpfully captures the basic notion not just in the United States but in contemporary constitutional law generally.

---

27 Here I am employing and analyzing what Webber refers to as the “received approach” to rights and their limits. Webber himself offers a critique and an alternative conception of limits and the function of limitations clauses that I will consider in Part III. Typically, although not always, this limited power is granted to both the legislature and the executive. However, because they generally represent more collective and participatory modes of decision making, the democratic justification for this power that I present in Part II applies more strongly to legislatures than the executive, as does the consequent standard of judicial review for its exercise.


29 This conception of a constitutional right is, in effect, accepted for those rights in various modern constitutions that are deemed in principle non-overridable; e.g., the right against cruel and inhumane (or unusual) punishment. The slogan of rights as trumps is usually associated with Ronald Dworkin, although there is some controversy as to whether, to what extent, or in what sense Dworkin himself ever did or does endorse this first conception. See, for example, the exchange between Jeremy Waldron and Richard Pildes in the Journal of Legal Studies: Jeremy Waldron, “Pildes on Dworkin’s Theory of Rights”, 29 J. Legal. Stud. 301 (2000); Richard H. Pildes, Dworkin’s Two Conceptions of Rights, 29 J. Legal Stud. 309 (2000). Arguably, Grégoire Webber makes this claim for constitutional rights, at least once they have been specified. Webber, The Negotiable Constitution, supra note 4 at 101-104.
By contrast, the second alternative, usually termed the “structural” or “excluded reasons” conception of constitutional rights, permits a right to be limited or overridden not because (or where) it is outweighed by the competing public policy claim, but because (or where) the state has acted for a permissible – rather than an excluded – reason in the relevant sphere. On this structural view, rights are not essentially individualistic in function but are, rather, “the tools constitutional law uses to maintain appropriate structural relationships of authority,” and rights adjudication becomes a categorical exercise that does not require or permit balancing but turns on the nature or type (not the weight) of the state’s justification for acting. If the state “infringes” or “qualifies” a right for a permissible reason, its action is automatically constitutional; if for an excluded reason, it is automatically unconstitutional. Although I believe that certain claimed differences between this excluded reasons conception of rights and the more dominant general conception that affirms and highlights balancing are generally false, this

---


32 See Pildes, ibid. at 734.

33 Ibid. at 734 (“Government can infringe on rights for reasons consistent with the norms that characterize the common goods that those rights are meant to realize, but when government infringes rights for reasons inconsistent with these common goods, it violates individual rights.”)

34 Ibid. at 761 (“Because rights are not trumps over the common good, they can be qualified when the state acts on the basis of justifications consistent with the character of the relevant common good in question. That is what makes a state interest compelling, not its “weight.”")

35 Ibid. at 735: “When government acts for reasons that are impermissible, its objectives are not weighed in an all-things-considered balance against the interests individuals have in their own autonomy, or dignity, or liberty. Rather, government action that rests on an impermissible justification simply is unconstitutional.”

36 These are primarily: (1) that balancing presumes an atomistic or individualistic notion of rights as protecting and promoting the autonomous self, and (2) that balancing involves an exclusively quantitative weighing of such rights against competing state interests. As for the first, the rights to be balanced can certainly include the type of collective goods (such as the proper boundary lines between different spheres of political authority) or group rights that proponents of the excluded reasons conception properly call attention to. As for the second, it is not true that the process of “weighing” rights against competing public policy objectives necessarily involves only quantitative
categorical nature of state authority does point to a real difference between them. Whereas for the excluded reasons conception, which focuses exclusively on the kind or type of purpose the state offers in justification for its action, acting for a permissible reason is sufficient for a valid limitation of a right, for the more dominant general conception it is necessary but not sufficient; other factors must be taken into account, precisely those that require a weighing or balancing of the competing claims.

A third alternative, which may or may not be a variation on one or other of the first two, is the specificationist conception of rights, which holds that the typical abstract framing of constitutional rights requires further specification of their meaning, scope and boundaries before they are capable of resolving rights issues, and that this process of rendering rights determinate is performed by setting limits to them. Accordingly, this conception rejects the standard two-step approach to rights analysis, for rights are constituted, and not burdened or restricted, by their limits. Once delimited in this way, constitutional rights provide exclusionary reasons with conclusory force.

The critical point in the face of these alternatives is that the dominant general conception of a constitutional right, of which a proportionality-type test for valid limits is an inherent part, is in need not only of identification and clarification but also of justification. That is, it must be

---

37 Necessary in that there is a threshold requirement of the reason or objective being either a specified or sufficiently important one before the proportionality test of means is triggered.

explained why constitutional rights should be balanced against, and potentially overridden by, non-constitutional rights claims. It may well be that (at least, absent a normative hierarchy) in conflicts between two constitutional rights claims, balancing is unavoidable or inherent, but between a constitutional rights claim and a non-rights claim, it surely is not. Accordingly, the existence of alternative conceptions of constitutional rights that do not – or rarely – permit such balancing renders justification imperative. Within the culture of justification perspective, I am not certain what the position of proportionality’s proponents is on this key threshold question, as they tend to focus on the subsequent one of the proper test or required burden of justification for an override, but let me try to express the answer from within the culture of democracy perspective.

I believe that David Dyzenhaus pointed us in the right direction by referring to this conception of constitutional rights (typified by the presence of a general limitations clause) as the “democratic model of constitutionalism”. In attempting to flesh out this insight in what follows, my claim is that a proportionality-type test provides as strong a set of constraints on government

---

39 Here, Dieter Grimm’s observation, referring to the Federal Constitutional Court, that “[t]he principle [of proportionality] was introduced as if it could be taken for granted” is apposite and, indeed, generalizable. Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence”, (2007) 57 U.T.L.J. 383 at 387. In this context, Robert Alexy’s rational reconstruction of the structure of constitutional rights in Germany may perhaps be recharacterized as presenting a conditional justification of balancing: if constitutional rights are conceptualized as principles to be optimized, and if certain non-constitutional rights claims are also granted this same status, then balancing is unavoidable or necessary. Of course, the task of justifying the conditions remains.

40 I am, of course, referring to normative, not interpretive, justification. Accordingly, even where constitutions contain express limits on rights, the normative question of whether proportionality and balancing are justified still arises.

41 David Dyzenhaus refers to the alternatives of a liberal model of constitutionalism (where a constitution “embodies a set of more or less absolute principles”) and a democratic model of constitutionalism (where there is a general limitations clause). Dyzenhaus, “Law as Justification,” supra note 1 at 32. In practice, the alternative, “liberal” model may exist more with respect to specific rights than to specific constitutions as a whole, as balancing is also a central feature of those constitutions without express limits on rights, such as the U.S. constitution. See also Dyzenhaus. “Proportionality and Deference in a Culture of Justification” in this volume. I have discussed at length the absence of American exceptionalism on this issue in Gardbaum, “The Myth and the Reality of American Constitutional Exceptionalism,” 107 Mich. L. Rev. 391 at 416-31 (2008).
action as is consistent with legitimate and enduring democratic/Kelsenian concerns about constitutionalizing rights and institutionalizing judicial review to enforce them in the first place.

There are three arguments in support of this claim – three ways in which a proportionality-like test enhances democratic values within a system of constitutionalized rights. The first is that it provides an appropriate balance between the competing demands of (1) politically accountable legislative decision-making as the normal implication of democracy’s foundational principle of political equality; and (2) the limits on such decision-making embodied in the legal form of constitutional rights. It is undoubtedly inherent in the concept of a constitutional (that is, constitutionalized) right that it places limits on ordinary politically accountable decision-making procedures, but what is not inherent is the type of limit involved. The conception of constitutional rights as trumps demands that such limits be peremptory or categorical; that in the face of a valid constitutional rights claim, politically accountable decision-making is totally disabled. But the general concept does not necessarily require that the particular limit take this form. Analytically, there is space for different types of limits, and the argument from democracy supports a conception of constitutional rights that is less disabling of popular self-government.

Constitutional rights as shields is this conception. Balancing, proportionality, and the limited override power, as the distinctive features of this conception, reflect such a less extreme limit on politically accountable decision-making. In the face of a valid constitutional rights claim as determined by the courts, the political institutions are neither totally disabled nor totally empowered. Rather, they are put to a special burden of justification that constrains both the objectives pursued and the means of pursuing them; and will never be satisfied by a mere majoritarian desire not to respect the right. This contrasts, of course, with the normal situation
where no constitutional right is implicated, in which the political institutions are legally free to act for any reason or objective. Accordingly, the limited override power steers a middle course between the two polar positions of: (1) the absolute disabling of ordinary democratic majoritarian procedures in the face of a constitutional right; and (2) the absolute empowering of ordinary democratic majoritarian procedures when a constitutional right is not in play. By thus employing a special, non-ordinary constraint on majoritarian decision-making, it satisfies the essential requirement of a constitutional right, but does not totally disable popular self-government.

A slightly different way of expressing this argument is that by rejecting the peremptory status of constitutional rights, the principle of proportionality acknowledges the democratic weight attaching to other competing claims asserted by the politically accountable institutions. This conception of constitutionalized rights, I suggest, better reflects democratic values than the absolute, disabling conception. To be sure, those specific things we believe governments should never lawfully be able to do regardless of the circumstances or conflicting objectives can be singled out for absolute protection without accepting that this inheres in all constitutional rights at all times—or that constitutional rights have no relevance to other situations. It is unnecessarily and unjustifiably restrictive of both democratic decision-making procedures and the role of constitutional rights for the latter to have such a totally disabling effect.

The second way in which proportionality enhances democratic values within a constitutionalized rights regime is by reducing the intertemporal tension between the set of entrenched rights established by a past majority and the consequent disabling of today’s citizens from deciding how to resolve many of the most fundamental moral-political issues that they face. The limited override power grants the current citizenry a deliberative role, through consideration
of whether they wish to and can invoke it, that provides an intermediate alternative in between
the two options of either complete exclusion of the current citizenry and formally changing rights
through the (typically cumbersome) amendment process.\footnote{Of course, (1) the more recent the constitution and (2) the easier the constitution is to amend – i.e., the closer to ordinary democratic decision-making procedures amendment is – the less important or relevant this argument becomes.}

Finally, my argument so far applies equally to determinate and indeterminate (or
underdeterminate) constitutional rights: (1) the limits that rights impose on democratic decision-
making need and should not be absolute; and (2) acknowledging this reduces the democratic
tension between past and current citizenry. That is, up to this point the argument for
proportionality does not depend on the existence of reasonable disagreement about what rights
there are and what they include among and between judges, legislators, and citizens. Rather, it is
about the power to limit or override a right \textit{as or however interpreted} in the face of conflicting
non-rights claims.

In reality, however, there is the well-known additional democratic problem posed by the
fact that many constitutional rights in many constitutions are (and perhaps inevitably so)
indeterminate in their meaning, scope, and application. In the face of such indeterminacy, the
traditional argument that, in being given the final word on whether rights have been infringed,
courts are simply subjecting the political institutions to the democratic will of the people as
enshrined in the constitution is rendered additionally problematic.\footnote{This argument goes back at least to Alexander Hamilton in Federalist 78.} As Michael Perry puts it:

\textquote{“Democracy requires that the reasonable judgment of electorally accountable government
officials, about what an indeterminate human rights forbids, trump the competing reasonable
judgment of politically independent judges.”}\footnote{Under a traditional system of strong-form judicial}
review granting interpretive finality to the courts (as, for example, in Germany and the United States), if constitutional rights were the only relevant claim, the outcome of constitutional adjudication would necessarily turn exclusively on the meaning, scope, and application of the right to the situation. In this context, the consequence of indeterminacy is that many of the most fundamental, important, and divisive moral and political issues confronting a society are decided by courts to the exclusion of citizens and their representative institutions, even though the courts are often divided along the same lines as the citizenry about the existence and scope of many rights.45

Proportionality and the limited override provide an alternative solution to this democratic problem than that of rejecting judicial supremacy, or ultimacy, in interpreting constitutional rights.46 It also, of course, provides an alternative to rejecting judicial review of constitutional rights altogether. They grant a role to the representative institutions in the decision-making process, not by challenging final judicial authority to determine the meaning and scope of an implicated constitutional right, but by introducing a second relevant claim: a discretionary and noninterpretive claim concerning the importance and weight of conflicting public objectives. The function of the limited override power is precisely to inject this essentially and inherently legislative role into the process of constitutional adjudication, even if the courts ultimately decide who wins the case. Constitutional adjudication is thus split into the two separate stages of (1) rights interpretation and application, and (2) assessment of competing public policy objectives.


46 This solution of rejecting judicial interpretive supremacy has been suggested by several people, including Michael Perry, “Protecting Human Rights”, supra note 44, and Larry Kramer, “The People Themselves: Popular Constitutionalism and Judicial Review” (2004), although in Kramer’s case this is primarily on historical grounds rather than as a solution to the problem of indeterminacy.
In short, balancing and the limited override power counter the judicial monopoly in constitutional decision-making that typically occurs where rights conclusively determine constitutional outcomes within a system of judicial review; a finality that is rendered highly problematic by the indeterminate nature of many of the relevant rights. Because their indeterminacy raises the democratic problem in perhaps its most acute form, constitutional rights should not be the only relevant claim in a case in which they are implicated.

In sum, the case for a proportionality-like test in the rights context is that it seeks to accommodate standard concerns about both constitutional rights and unlimited legislative power by neither rendering the former an absolute bar to conflicting legislative action nor granting legislatures an absolute power to override rights. Rather, proportionality limits this power by imposing the substantive constraint of demonstrable justification in terms of public reason. We thus arrive at the same point as the culture of justification proponents, but do so as the result of a prior, threshold stage of normative inquiry that provides a broader, more comprehensive view in which the constraining and justificatory function of proportionality is seen as secondary to its primary point of enhancing the democratic part of constitutional democracy.

This understanding of proportionality has significant implications for how courts should exercise their judicial review function in the rights context. If at least part of the point of proportionality is to temper and accommodate democratic concerns that judicial enforcement of (often indeterminate) constitutionalized rights creates by permitting them to be limited or overridden subject to its substantive burden of justification, then those tensions should not be reproduced or aggravated by the way in which courts review exercises of this power. A standard of review that authorizes courts to substitute their own view on whether the burden is satisfied and the power validly exercised for the reasonable one of the political institutions seems clearly
counterproductive.47 Moreover, review of the limited override power by the courts arguably increases the tensions because it adds a step to constitutional rights adjudication that raises special concerns about judicial legitimacy and integrity over and above the standard ones.48 Accordingly, both the purpose and nature of the limited override power under proportionality-like tests strongly suggest that the question reviewing courts should ask is whether the legislative judgment that the substantive constitutional criteria for an override have been satisfied in the particular context is a reasonable one, and not whether the judges agree with it. Once again, we arrive at the same point as certain culture of justification proponents,49 but do so from a more comprehensive and foundational view of the landscape.

III. Proportionality and Other Versions of Democratic Constitutionalism

In the previous section, I set out the case from a culture of democracy perspective for the contemporary constitutional paradigm of rights and their limits, with its well known two-step analysis. Within this paradigm, the second step incorporates a limited power granted to the political institutions to act inconsistently with the rights as judicially construed at the first step, the limit being specified by the substantive constraint of public justification as given by the various prongs of the proportionality test. Other proportionality-like tests for overriding rights, such as U.S.-style balancing, provide slightly different specifications of the limit. In the general debate about the merits of judicial review, it is primarily this system that ought to be the object of discussion, as it is increasingly the norm around the world. Such a system is different from –

47 I have spelled out my view on the implications of this justification for the standard of review to be applied by the courts in detail elsewhere. See Gardbaum, Limiting Constitutional Rights, 54 U.C.L.A. L. Rev. 789 at 829-51 (2007).


49 For example, Kumm, “Democracy is not Enough”, supra note 2.
and, as I have attempted to establish, somewhat easier to justify than – a mostly hypothetical one without such a power.

I have not claimed, however, that this system is the only one that can plausibly be understood as democratic constitutionalist, in the sense of ensuring some greater balance of power between legislatures and courts than under traditional conceptions of judicial supremacy. Nor have I claimed that a proportionality-based system has a stronger democratic justification than these others. In this final section, I will briefly outline these other versions of democratic constitutionalism and offer some tentative thoughts on their comparison and relative merits.

These other versions consist of two alternative institutional forms of constitutionalism that currently exist in practice and an alternative theoretical conception of constitutional rights and their limits to the dominant paradigm that does not. The institutional forms are (1) political constitutionalism or traditional legislative supremacy, in which, very roughly-speaking, there are no higher law rights or judicial powers to review the substance of legislation; and (2) “weak-form judicial review” or “the new Commonwealth model of constitutionalism” as introduced by recent bills of rights in Canada, New Zealand, the United Kingdom, the Australian Capital Territory and state of Victoria.\(^50\) The alternative conception of rights and their limits is “legislative specificationism.” As outlined above, this conception rejects the dominant paradigm’s two-step approach, in which the meaning and scope of a right are determined prior to the limitation analysis for justified infringements, in favor of the view that rights are constituted and rendered determinate by their limits as specified by the legislature.\(^51\) In what follows, I will

---

\(^50\) In my view, weak-form judicial review is a key constituent part of the new Commonwealth model, but not the whole of it: the other key part is pre-enactment political rights review. See Stephen Gardbaum, \textit{The New Commonwealth Model of Constitutionalism: Theory and Practice} (2013) [Gardbaum, \textit{The New Commonwealth Model of Constitutionalism}].

\(^51\) Webber, \textit{The Negotiable Constitution}, supra note 4 chs. 4-6.
focus on these two latter versions as political constitutionalism is a longstanding, very well-known and much discussed option. It is also a more distant comparator of proportionality as it is not a version of democratic constitutionalism that generally recognizes or accommodates higher law rights and judicial review, unlike the other two.

Increasingly, the real-world alternative to the limited override power that I have argued is a central feature of the dominant, proportionality-based paradigm of constitutional rights is not a system without an override power at all, but a system with a substantively unlimited one. Thus, the recent innovation of weak-form judicial review as part of the new Commonwealth model of constitutionalism empowers the political institutions to override protected rights as interpreted by the judiciary without satisfying the burden of justification provided by the proportionality test.\(^{52}\) In arguing that proportionality represents as strong a constraint as is consistent with legitimate democratic concerns about judicial review, this unlimited override power obviously represents a weaker (though not non-existent) constraint. Accordingly, the respective normative and practical merits of these two alternatives are, I believe, a more interesting and pressing topic than the abstract merits of two polar systems – judicial review without a limited override power and no judicial review at all – that do not, or barely, exist in practice.

Under weak-form judicial review, the constraints on the political institutions in the rights context are a combination of the legal and political. Typically, courts will first employ proportionality analysis, as under standard contemporary strong-form review, to determine whether a right has been justifiably infringed. Only if the answer is no, do the distinctive mechanisms of weak-form review come into play. In Canada, legislatures may exercise their substantively unlimited power under section 33 of the Charter to override most (but not all)

\(^{52}\) As we will see, typically in these systems, the proportionality test operates as it does in strong-form systems, but with the added feature that the political institutions may override a right that the courts have declared not justifiably limited.
rights by ordinary majority vote for a renewable period of five years. In New Zealand, the UK, and the two Australian jurisdictions that have adopted versions of the new Commonwealth model, courts then go on to ask whether the statutory provision in question can be interpreted consistently with the right, and if so, they have a duty to employ that interpretation. As with statutory interpretation generally, legislatures have the legal power to respond by amending the statute if they believe the court is mistaken. If the statute cannot be interpreted consistently with the right, the courts must apply it to the case in hand but may issue a declaration of incompatibility or inconsistent interpretation. This has no direct legal effect as legislatures have no legal duty to amend or repeal such a statute, but not doing so could potentially result in significant political costs for the government. In short, the substantive legal constraint of proportionality is superseded in certain cases by the political constraint of acting contrary to a judicial declaration of rights infringement. Similarly, the legal burden of justification under proportionality is superseded in these cases by the political burden of justifying the continuing judicially and publicly-declared infringement.

Accordingly, the choice between proportionality’s substantively limited override power and the new Commonwealth model’s unlimited one is typically not an either-or one, but whether to have only the limited power or both. The best-known example of this is the Canadian Charter, in which section 1 specifies the limited override power and section 33 the unlimited. Indeed, to

---

53 Section 33(1) of the *Canadian Charter of Rights and Freedoms* provides: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” Section 33 may be used pre-emptively, thereby immunizing a law from judicial review.

54 New Zealand Bill of Rights Act 1990, s. 6; UK Human Rights Act 1998, s. 3(1); ACT Human Rights Act 2004, s. 30; Victorian Charter of Human Rights and Responsibilities Act 2006, s. 32(1).

55 UK Human Rights Act 1998, s. 4; ACT Human Rights Act 2004, s. 32; Victorian Charter of Human Rights and Responsibilities Act 2006, s. 36. This power was seemingly implied by the New Zealand Court of Appeal in its 1999 decision in *Moonen v. Film and Literature Board of Review* [2000] 1 N.Z.L.R. 9 (CA), although it has never clearly been used.
the extent that “dialogue” between courts and legislatures has been claimed as a benefit of weak-form review, it may not be a distinctive one as section 1 has been presented as an alternative and more successful source of dialogue in practice. Moreover, although the legal allocation of the final word is granted to courts under the limited power, in which its proportionality analysis is the second and final step of rights adjudication, and to legislatures under the unlimited power, this allocation may not reflect the reality in practice. Thus, it has been claimed that under section 1, the de facto final word is given to legislatures in their characteristic responses to judicial invalidation of statutes; whereas under section 33 and the UK HRA, the de facto final word is granted to courts.

In thinking about the relative merits of proportionality and the new Commonwealth model as two versions of democratic constitutionalism, one question is whether the greater judicial power of strong-form review versus weak-form can be justified from this perspective. To address this question, let me simply stipulate for current purposes that the normative case for the new model is premised on reasonable disagreement with the courts on a rights issue. In one sense, therefore, if courts and legislatures both adhere to their normatively assigned roles and courts only invalidate legislation for which there is no reasonable public justification under proportionality analysis, then legislatures would never exercise their override power – which perhaps becomes redundant. But by the same token, under this scenario it cannot be said that

---


57 Hogg and Bushell, *ibid*.


59 For explanation and defense of this stipulation, see Gardbaum, id., ch 4.
strong-form judicial review is necessary, for weak-form review would achieve exactly the same result. More realistically, however, the risk that both will depart from their normatively circumscribed powers must be taken into account: that courts will invalidate reasonable legislative decisions in favor of the court’s view of the correct one and legislatures will exercise their override power in support of unreasonable legislative decisions. In these circumstances, is strong-form judicial review rather than weak justified? In current practice, the normative standard I have proposed for judicial review under proportionality analysis is not in fact the one that is generally understood to govern, and courts regularly overturn legislative decisions which cannot be said to be unreasonable.60 But what if it were? Under strong-form review, there is little to counter the risk of judicial overreaching on this issue – as by reason of their very independence, courts face no direct political constraint – and the legislative override power would be a useful institutional check in the absence of others as a form of separation of powers. Moreover, we are by hypothesis here – a court has invalidated a reasonable legislative act – in the situation where the principle of a reasonable legislative judgment trumping a reasonable judicial one applies, so that use of the override would be justified. By contrast, unlike the strong-form judicial power, this legislative power would be subject to a significant institutional or political constraint against the risk of misuse; namely, the fact that a court has issued a formal judgment finding there to be no reasonable public justification for the legislation violating individual rights. Finally, so far we have been discussing the situation in which there have been clear departures from the standard of reasonableness, but the limits of reasonable disagreement may also be subject to reasonable disagreement.61 That is, courts and legislatures may reasonably

60 That is, in applying the second and third prongs of the proportionality principle courts tend to ask whether the legislature’s justification for limiting a right is in fact necessary (or the least restrictive means) and proportionate in the strict sense, rather than reasonably necessary and proportionate.
disagree about whether a legislative act is within the bounds of the reasonable. For the same two reasons just noted – the checking function of the override and the default or tie-breaking nature of legislative power that democracy requires – weak-form review also seems the more justified solution here.

In some ways, it is easier to mask an override of rights under the limited power than the unlimited version. Where an override is given the “blessing” of the court under proportionality analysis, the visibility and political costs are likely to be far lower – the courts have played their role as the watchdog of rights and the reasonableness of government action has been demonstrated. It is a form of pre-emptive override within the legal system without the friction and publicity of the reactive override, which heightens political accountability. In both cases, however, rights are being overridden by the government within the bounds of its legal powers, and the issue is which mode is more consistent with our full range of normative commitments.

Finally, the argument that the fundamental point of judicial review is to institutionalize “Socratic contestation” – to put government action to an enforced test of public justification as a prerequisite of its legitimacy – is arguably fulfilled by weak-form review as well as strong. Since proportionality analysis is typically carried out in same way under both, the same process of putting the government to the burden of justification has been undertaken by the courts. The only difference is that it is legitimate for the political institutions to proceed even though they have not satisfied this burden according to the courts. Perhaps the function of Socratic contestation can then be said to move from the courts to citizens, from legal to political legitimacy. A slightly different test to be sure, but one that is not obviously inconsistent with the principles of democratic constitutionalism.

---

Turning now to the alternative conceptualization (rather than institutionalization) of rights, let us compare the legislative specificationist account of limitations on rights with the limited and unlimited override powers of the proportionality paradigm and the new Commonwealth model respectively. In his elegantly conceived and executed book, Grégoire Webber rejects the “received approach” to limiting rights with its two separate stages of first defining the scope of a right and assessing whether it has been interfered with, and then determining if the legislature has justifiably – that is, proportionately – acted inconsistently with the right as previously defined. Rather, limits on rights and limitations clauses should be understood as part of the single function of determining the meaning and scope of rights, which as typically framed in bills of rights are “underdeterminate” and require further specification in order to resolve the issues in which they are implicated. In this way, limits constitute rights rather than restrict them. The task of specification, of rendering underdeterminate rights determinate, belongs, he argues, to legislatures rather than courts for both democratic and textual (this is what limitations clauses, properly understood, prescribe) reasons. Once specified, rights provide exclusionary reasons and have conclusory force. Finally, judicial review is limited to invalidating legislative specifications for which no public reasons can be offered in support.62

Webber’s overarching claim that limits on rights should properly be conceived as constitutive rather than restrictive has both descriptive/textual and normative components. The descriptive/textual component is that courts and scholars are misunderstanding or misinterpreting limitations clauses in a way that falsely equates the single expressly stated term “limits” on rights with infringements, restrictions, interferences, or overriding of rights – using them interchangeably.63 Rather, such limits should be understood in the distinct and separate sense of

setting the boundaries of, or delimiting, rights. To support this claim, Webber relies primarily on the text of the Canadian Charter’s general limitations clause and the ones in New Zealand, South Africa and Australia directly influenced by it, which indeed employ only the term “limits.”

However, this is not true of the limitations clauses in other influential bills of rights, including the German and the European Convention on Human Rights (ECHR), from which the dominant proportionality paradigm emerged. Thus, in its several special limitations clauses attaching to particular rights, the German Basic Law variously employs the terms “limits,” “restrictions,” and “interferences” in describing the relevant legislative empowerment. Similarly, limitations clauses in the ECHR use the terms “interferences,” “limitations,” and “restrictions” on rights. By contrast, both the German Basic Law and the ECHR use the term “violation” to refer to an impermissible limitation of a right for which the individual is guaranteed a remedy.

Accordingly, the two-step approach and conceptualization is not simply a creation of judicial and scholarly minds, but has a more solid basis in the texts of limitations clauses than Webber suggests. Moreover, although he is undoubtedly correct that as a general semantic matter the word “limit” does have these two distinct meanings, so that “by understanding limitation as

---

63 Ibid. at 123-5.
64 Canadian Charter of Rights and Freedoms, section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
65 Basic Law for the Federal Republic of Germany, Article 5(2) [German Basic Law].
66 Ibid., Articles 8(2); 10(2); 11(2); 13(7); 19(1).
67 Ibid., Art 2(2); 13(7).
68 European Convention on Human Rights, Article 8(2) [ECHR].
69 Ibid. Article 9(2).
70 Ibid. Article 10(2).
71 German Basic Law, Article 19(4); ECHR, Article 13.


specification, one can read a limitation clause as calling for ‘reasonable boundaries’ or ‘reasonable definitions’ or ‘reasonable perimeters’ of rights,”\textsuperscript{72} as an intuitive matter this does not seem the most compelling or plausible reading of the term in this particular context, to the extent there is any clear or obvious difference between them here. If the government limits your rights, it sounds as if it is restricting or interfering with, rather than defining, them. Re-defining perhaps. In this context at least, limiting and delimiting rights do not seem synonymous.

The normative component of the claim is that even if enshrined in constitutional texts and in “human rights law-in-action,”\textsuperscript{73} we should nonetheless reject the “received approach” and conceive of rights and their limits in this way because it better comports with both democracy – in that it transfers the power of specification from courts to legislatures – and the special normative force attaching to rights. But it is not obvious why, at least as viewed through the lens of the culture of democracy perspective, the two-step conceptualization needs to be rejected outright for these reasons rather than perhaps amended. There appears to be nothing inherent in the framework itself to prevent a more stringent approach to the first step, one that defines rights in a more circumscribed and less “inflationary” way, for example ruling out trivial liberty claims.\textsuperscript{74} And to the extent that only more serious rights claims qualify under the first step, proportionality in the strict sense under the second step would correspondingly permit only more serious competing considerations to justify limiting or overriding them. This would generally bolster the normative force of rights claims. Moreover, as already mentioned, those specific rights that ought to have the strongest normative force can be given it within the framework of the received approach either by categorical textual provision -- as with the rights against “torture

\textsuperscript{72} Webber, \textit{The Negotiable Constitution}, supra note 4 at 133.

\textsuperscript{73} Webber, in this volume.

\textsuperscript{74} Cf. Kai Moller, in this volume.
or inhuman or degrading treatment or punishment,” slavery and forced labor, and the right to a fair and public hearing under Articles 3, 4 and 6 of the ECHR -- or by refusing to deem any conflicting objective sufficiently important or proportionately pursued.

When all is said and done, there seems to be little clear practical or normative difference in the scope of legislative or judicial power between the culture of democracy perspective on proportionality and legislative specificationism. In both, a reasonable public justification for the legislative act is sufficient (and necessary) for it to survive judicial scrutiny. Indeed, even some culture of justification proponents of proportionality propose this lenient standard of judicial review. So, for example, under proportionality analysis a valid statute prohibiting individuals from openly expressing racist political views in the public square that reject or deny equality of citizenship would be deemed a reasonable legislative limit in the sense of a reasonable restriction on, or infringement or override of, the right to free expression; whereas under specificationsim, it would be deemed a reasonable legislative limit in the sense of a reasonable setting of the boundary of the right – as not encompassing such racist political expression. Both accounts grant legislatures greater powers over rights issues than under standard understandings, and for similar democratic reasons. The only difference is conceptual: whether legislatures should be understood as lawfully limiting judicially specified rights or as specifying rights themselves. Even if the latter approach is analytically cleaner, there does not seem to be much of a normative difference between these two conceptualizations in terms of democracy or the special force of rights. Finally, although both proportionality as presented and legislative specificationism reduce the judicial role to reviewing for reasonable public justifications only, this still gives the legal power of the final word to the courts, unlike the case under the new Commonwealth model.

75 Kumm, “Democracy is not Enough”, supra note 2.
IV. Conclusion

From the perspective of democratic constitutionalism, the appeal of proportionality is that it creates a greater balance between judicial and legislative power than certain other models of rights analysis and conceptions of constitutional rights, granting legislatures a greater role in the resolution of contentious and controversial rights issues. A conception of constitutional rights as putting government action to the burden of reasonable public justification tempers certain enduring democratic concerns about judicial review and a constitutionalized rights regime by providing a more proportionate accommodation of the respective values. From this perspective, proportionality is not about the power of judges to resolve indeterminate rights claims or issues of policy outside their formal areas of expertise, but about the power of legislatures to balance valid rights claims against other significant public policy objectives subject to the constraint of substantive reasonableness. The concern about proportionality is that, as with all normative constraints on an independent judiciary when their decisions are final within the parameters of the legal system, courts have the practical power to undermine this balance and tip it firmly in their direction.