stitutionally protected legal values must be harmonized with one another when such values conflict. One constitutional value may not be realized at the expense of a competing constitutional value. In short, constitutional interpretation is not a zero-sum game. The value of free speech, for example, rarely attains total victory over a competing constitutional value such as the right to the development of one's personality. Both values must be preserved in creative unity. Professor Konrad Hesse wrote: "The principle of the Constitution's unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values."[81]

PROPORTIONALITY. The principle of proportionality, like the concept of an objective value order discussed in the next section, is crucial to any understanding of German constitutional law. Proportionality plays a role similar to the American doctrine of due process of law. The Basic Law contains no explicit reference to proportionality, but the Constitutional Court regards it as an indispensable element of a state based on the rule of law. The court consistently invokes the principle of proportionality in determining whether legislation and other governmental acts conform to the values and principles of the Basic Law. In much of its work, the court seems less concerned with *interpreting* the Constitution — that is, defining the meaning of the documentary text — than in applying an ends-means test for determining whether a particular right has been overburdened in the light of a given set of facts. In fact, the German approach is not so different from the methodology often employed by the United States Supreme Court in fundamental rights cases.

In its German version, proportionality reasoning is a three-step process. First, whenever parliament enacts a law impinging on a basic right, the means used must be appropriate (*Eignung*) to the achievement of a legitimate end. Because rights in the Basic Law are circumscribed by duties and are often limited by objectives and values specified in the constitutional text, the Constitutional Court receives considerable guidance in determining the legitimacy of a state purpose. The sparse language of the United States Constitution, by contrast, often encourages the Supreme Court to rely on nontextual philosophical arguments to determine the validity of a state purpose that impinges on a constitutional right. Second, the means used to achieve a valid purpose must have the least restrictive effect (*Erforderlichkeit*) on a constitutional value. This test is applied flexibly and must meet the standard of rationality. As applied by the Constitutional Court, it is less than the "strict scrutiny" and more than the "minimum rationality" test of American constitutional law. Finally, the means used must be proportionate to the end. The burden on the right must not be excessive relative to the benefits secured by the state's objective (*Zumutbarkeit*).[82] This three-pronged test of proportionality seems fully compatible with, if not required by, the principle of practical concordance.

AN OBJECTIVE ORDER OF VALUES. In its search for constitutional first principles, the Constitutional Court has seen fit to interpret the Basic Law in terms of its overall structural unity. Perhaps "ideological unity" would be the more accurate term, for the Constitutional Court envisions the Basic Law as a unified structure of *substantive* values.[83] The centerpiece of this interpretive strategy is the concept of an objective order of values, a concept that derives from the gloss the Federal Constitutional Court has put on the text of the Basic Law. According to this concept, the Constitution incorporates the basic value decisions of the founders, the most basic of which is their choice of a free democratic basic order — a liberal, representative, federal, parliamentary democracy — buttressed and reinforced by basic rights and liberties. These basic values are objective because they are said to have an independent reality under the Constitution, imposing on all organs of government an affirmative duty to see that they are realized in practice.

The notion of an objective value order may be stated in another way. Every basic right in the Constitution — for example, freedom of speech, press, religion, association, and the right to property or the right to choose one's profession or occupation — has a corresponding value. A basic right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the general legal order.[84] One example may suffice: The *right* to freedom of the press protects a newspaper against any action of the state that would encroach on its independence, but as an objective *value* applicable to society as a whole, the state is duty bound to create the conditions that make freedom of the press both possible and effective. In practice, this means that the state may have to regulate the press to promote the value of democracy; for example, by enacting legislation to prevent the press from becoming the captive of any dominant group or interest.

This view of the Constitution as a hierarchical value system commands the general support of German constitutional theorists, notwithstanding intense controversy on and off the bench over the application of the theory to specific situations.[85] From some jurisprudential perspectives this theory allows the court to engage in open-ended decision making while appearing to be text-bound. It is an ingenious — some critics would say disingenuous — judicial methodology. As Clarence Mann has written, "It harbors the illusions of determinate norms in the fact [*sic*] of inarticulated value premises and of judicial neutrality aloof from the creative search for normative content," yet, in contrast to *Begriffsjurisprudenz*, it does "not necessarily exclude considerations of political reality in the construction and application of the constitution."[86] In short, it satisfies the traditional German yearning for objectivity in the sense of separating law from politics yet tolerates the search for purpose in constitutional law.

Indeed, the Constitutional Court has occasionally spoken of certain supraposi-tivist norms that presumably govern the entire constitutional order. In an early case decided in 1953, the court, recalling the Nazi experience, rejected "value-free

Federal Constitutional Court's jurisprudence, however, these rights are ranked as fundamental not only for their value in the promotion of economic growth but also for their intrinsic moral value. Indeed, the court has come close to developing a coherent philosophy of work. Work is seen less as a means of earning a living than as the foundation of human personality. Work is vocation as well as job, and necessary for personal self-realization. Yet these rights, like most rights under the Basic Law, are subject to regulation "by or pursuant to a law" (Article 12 [1], sentence 2).

6.7 Pharmacy Case (1958)
7 BVerfGE 377

[Bavaria restricted the number of pharmacies licensed in any given community. The state's Apothecary Act provided for the issuance of additional licenses only if the new pharmacies would be commercially viable and would cause no economic harm to nearby competitors. In 1955 Bavaria invoked this statute to deny a license to a person who had recently immigrated from East Germany, where he had been a licensed pharmacist. The aggrieved applicant filed a constitutional complaint against the decision of the Bavarian government and the statutory provision under which the action was taken. In striking down the action, the Constitutional Court set forth the general principles governing its interpretation of the right to occupational choice.]

Judgment of the First Senate. . . .

Section 3 (1) of the Bavarian Apothecary Act of June 16, 1952, as amended on December 10, 1955, is void. . . .

B. IV. Whether Article 3 (1) of the Apothecary Act is consistent with Article 12 (1) requires a discussion of the fundamental propositions concerning the importance of the right to choose a trade.

1. Article 12 (1) protects the citizen's freedom in an area of particular importance to a modern society based on the division of labor. Every individual has the right to take up any activity which he believes himself prepared to undertake as a "profession" — that is, to make [the activity] the very basis of his life. . . . [Article 12 (1)] guarantees the individual more than just the freedom to engage independently in a trade. To be sure, the basic right aims at the protection of economically meaningful work, but it [also] views work as a "vocation" [*Beruf*]. Work in this sense is seen in terms of its relationship to the human personality as a whole: It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence, through which that person simultaneously contributes to the total social product. . . .

2. . . . The idea of a "profession" within the meaning of the Basic Law embraces not only those occupations identified by custom or by law, but also freely chosen activities that do not correspond to the legal or traditional conception of a trade or profession.

(b) The text of Article 12 (1), when viewed against the backdrop of the real significance of the basic right, suggests that the legislature may regulate the *practice* but not the *choice* of an occupation. But this cannot be the [true] meaning of the provision, for the concepts of "choice" and "practice" are not mutually exclusive. Taking up a profession represents both the choice of an occupation and the beginning of its practice. Indeed, the choice of an occupation may not be manifested until it is practiced. Similarly, the intent to remain in an occupation, expressed through its continued practice, together with the voluntary discontinuance of its practice, are essentially acts of vocational choice as well. Both concepts represent a complex unity and, although viewed from different angles, are incorporated into the notion of "vocational activity."

Thus, an interpretation which would absolutely bar lawmakers from *every* interference with vocational choice cannot be correct. . . . Rather, a legal regulation purporting primarily to limit the *practice* of an occupation would survive constitutional analysis even if it has an indirect effect on the choice of an occupation. This situation occurs primarily where the choice of an occupation is largely dependent upon admission standards. Article 74 (19), authorizing the federation to enact laws governing admission to certain occupations, is evidence that the framers did not intend to summarily exclude legislation pertaining to occupational admission standards. But the history of this provision [citing the original debates in the Parliamentary Council] shows that as a general rule they sought also to curtail this power. . . . To be sure, the framers of the Basic Law fell short of a fully objective and conceptual clarification of these problems. Ultimately they came up with a formulation that closely followed the distinction between "choice" and "practice" familiar in the field of trade law and were content to leave the rest to regulation by law. . . .

In any case, Article 12 (1) is a unified basic right in the sense that the reservation clause of sentence 2 ["The practice of trades, occupations, and professions may be regulated by or pursuant to a law"] grants the legislature the power to make regulations affecting either the choice or the exercise of an occupation. But this does not mean that the legislature is empowered to regulate each of these aspects of vocational activity to the same degree. For it is clear from the text of Article 12 (1) that occupational choice is to remain "free" while the practice of an occupation may be regulated. This language does not permit an interpretation that assumes an equal degree of legislative control over each of these "aspects." The more legislation affects the choice of a profession, the more limited is the regulatory power. This interpretation accords with the basic concepts of the Constitution and the image of man founded on those concepts. The choice of an occupation is an act of self-determination, of the free will of the individual; it must be protected as much as

possible from state encroachment. In practicing an occupation, however, the individual immediately affects the life of society; this aspect of [vocational activity] is subject to regulation in the interest of others and of society.

The legislature is thus empowered to make regulations affecting either the choice or the practice of a profession. The more a regulatory power is directed to the choice of a profession, the narrower are its limits; the more it is directed to the practice of a profession, the broader are its limits. . . .

(c) . . . The general principles governing the regulation of vocational activity may be summarized as follows: The practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only for the sake of a compelling public interest; that is, if, after careful deliberation, the legislature determines that a common interest must be protected, then it may impose restrictions in order to protect that interest – but only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice. In the event that an encroachment on freedom of occupational choice is unavoidable, lawmakers must always employ the regulative means least restrictive of the basic right.

A graduated scale of possible restrictions governs the legislature's authority to regulate vocational activity.

Lawmakers are freest when they regulate the practice of an occupation. In regulating such practice, they may broadly consider calculations of utility. Lawmakers may impose limitations on the right to practice a profession so as to prevent detriment and danger to the general public; they may also do so to promote an occupation for the purpose of achieving greater total performance within society. Here the Constitution protects the individual only against excessively onerous and unreasonable encroachments. Apart from these exceptions, such restrictions on the freedom of occupation do not greatly affect the citizen since he already has an occupation and [the statutory restrictions] leave the right to exercise an occupation inviolate.

On the other hand, if [the legislature] conditions the right to take up an occupational activity on the fulfillment of certain requirements, thus impinging on the choice of an occupation, then regulations for the public good are legitimate only when such action is absolutely necessary to protect particularly important community interests; in all such cases the restrictive measures selected must entail the least possible interference. But the nature of a regulation prescribing conditions for admission to a profession depends on whether the legislation deals with individual conditions, such as those of educational background and training, or with objective conditions irrelevant to one's personal qualifications and over which one exercises no control.

The regulation of individual (subjective) conditions [for admission to an occupation] is a legitimate exercise of legislative authority. Only those applicants possessing the proper qualifications, determined in accordance with preestablished

formal criteria, will be admitted to a trade or profession. Many occupations require knowledge and skills that can be acquired only through theoretical and practical schooling. Without such preparation the practice of such occupations would be impossible or deficient and perhaps even dangerous to the general public. . . . Thus the limits on freedom of choice here are needed to safeguard the public against certain liabilities and hazards. Such limits are reasonable because applicants for various professions know well in advance of their choice whether or not they have the proper qualifications. The principle of proportionality governs here; any requirements laid down must bear a reasonable relationship to the end pursued [i.e., the safe and orderly practice of a profession].

The situation is different, however, when the state proceeds to control the objective conditions of admission. Here the matter is simply out of the individual's hands. Such restrictions contradict the spirit and purpose of the basic right because even one whom the state has permitted to make his choice by meeting the requirements of admission may nevertheless be barred from an occupation. This encroachment on a person's freedom cuts all the more deeply the longer he has had to attend school and the more specialized his training. . . . Because it is not altogether clear what direct disadvantages for the general public will result when a professionally and morally qualified applicant exercises his occupation, the [legislature] will often not be able to show a connection between the limitation on occupational choice and the desired result. In such situations the danger of impermissible legislative motivations is present. In this case it appears that [the legislature] intends to impose the restriction on admission in order to protect practicing pharmacists from further competition, a motive which, by general consensus, can never justify a restriction on the freedom to choose an occupation. This crude and most radical means of barring professionally and presumably morally qualified applicants from their chosen profession thus violates the individual's right to choose an occupation, quite apart from any possible conflict with the principle of equality. Limits upon the objective conditions of admission are permissible on very narrowly defined terms. Generally speaking, [the legislature] may impose them only when they are needed to demonstrate highly probable dangers to community interests of overriding importance. . . .

V. . . . Public health is doubtless an important community interest [whose] protection may justify encroachments on the freedom of the individual. Additionally, there is no doubt that an orderly supply of drugs is crucial for the protection of public health. "Orderly" in this context means that needed drugs will be available to the general public and that their distribution will also be controlled. . . . The Bavarian legislature presumably had these objectives in mind, but between the lines of the legislation we can also discern the political aims of a pharmacy profession at work to protect its [narrow] interests and the traditional concept of the "apothecary."

The decisive question before us is whether the absence of this restriction on the

establishment of new pharmacies would . . . in all probability disrupt the orderly supply of drugs in such a way as to endanger public health.

We are not convinced that this danger is impending.

VII. . . . Section 3 (1) of the Bavarian Apothecary Act is unconstitutional because it violates the basic right of the complainant under Article 12 (1). . . .

NOTE: *PHARMACY* AND ITS PROGENY. The *Pharmacy* case reaffirmed the rule that any restriction imposed on a fundamental right must be accomplished by a specific legislative enactment (*Gesetzesvorbehalt*),[75] and once again indicated the Federal Constitutional Court's preoccupation with proper decision-making methods. *Pharmacy* also set forth for the first time the gradation theory (*Stufentheorie*) for assessing restrictions on occupational choice. Finally, the decision is a resounding affirmation of the dignity of work and its relationship to human personality. The term *Beruf* is broadly construed to relate to any occupational activity an individual may legally choose as his or her life's work. But particular occupations may be regulated in the public interest so long as the freedom to choose an occupation is not thereby unduly burdened. Thus the court clearly differentiates between the choice of an occupation and its practice.

A regulation of occupational choice triggers a higher standard of review than a regulation of practice. Limits on choice must satisfy what the court describes as "subjective" and "objective" needs. Under the standard of subjectivity, the state may regulate choice only to the extent necessary to ensure the proper training of the individual wishing to embark upon a given career. The standard of objectivity relates to the regulation, in the wider public interest, of the trade or occupation itself. A recent case reaffirming these propositions is the *Technician Licensing* case (1992). The court sustained legislation that requires sufficient professional knowledge and expertise before a license can be issued to persons setting themselves up as independent advisors or experts in their specific professional field, but following *Pharmacy* the court denied the state's authority to refuse such a license on the ground that there are enough experts already operating in the field.[76]

An illustration of "objective need" analysis is the *Long-Haul Truck Licensing* case (1975).[77] Transportation officials refused to grant long-haul trucking permits to certain companies because the quota for such permits, fixed by law, had already been filled. Employing the gradation theory, the court found that the restriction was a necessary and proper means of preventing a major threat to compelling public interests. Declared the court: "The federal railroad is indispensable for the national economy. This is true not only for passenger transportation, but for freight traffic as well, whose protection fixed quotas are meant to serve. A modern economy based on the division of labor cannot do without this means of transportation which moves great volumes of freight quickly and over long distances. . . . Supplying the

population with vital goods could not be guaranteed without the railroad, thus the railroad helps to safeguard the existence of every individual."[78]

As the *Pharmacy* case indicates, the practice of trades and occupations may be regulated in the public interest. The Federal Constitutional Court has, accordingly, upheld laws (1) imposing reasonable age limits on the practice of a profession, (2) permitting only licensed pharmacists to sell certain drugs, (3) prohibiting general public advertising by physicians, (4) regulating the hours when business establishments may remain open, (5) forbidding bakery shops from operating during certain nighttime hours, and (6) withdrawing an attorney's license if he or she engages in a second occupation that is incompatible with that of an independent lawyer.[79] On the other hand, the court invalidated a law restricting the number of doctors allowed to treat patients covered by a statutory medical insurance fund (*Medical Insurance I* case [1960]),[80] as well as several judicial rulings preventing certain lawyers from serving as defense counsel in particular cases.[81] The *Chocolate Candy* case illustrates the point that even general consumer protection legislation may run afoul of Article 12 (1) if it violates the principle of proportionality.

6.8 Chocolate Candy Case (1980)
53 BVerfGE 135

[A federal consumer protection statute banned the sale of foodstuffs that might be confused with products made of chocolate. The statute was successfully invoked against a producer of Christmas and Easter candy made of puffed rice and coated with chocolate. The company brought a constitutional complaint grounded on Article 12 (1) against a decision of the Federal High Court of Justice sustaining the ban as applied.]

Judgment of the First Senate. . . .

II. The constitutional complaint is justified.

1. Section 14 (2) of the Chocolate Products Act of June 30, 1975, is incompatible with Article 12 (1) to the extent that it imposes an absolute ban on the sale of the designated product. The provision under discussion regulates the practice of an occupation. Under Article 12 (1) a regulation may be imposed only by law or pursuant to a law. If an administrative decree regulates the practice of an occupation, it must be rooted in a delegated power authorized by the Basic Law and must adhere to the confines of this delegated power. Reasonable concerns for the common good must justify the regulation, and the means chosen [to implement the regulation] must be necessary and proper for the achievement of its purpose. Section 14 (2) of the Chocolate Products Act satisfies this requirement only in part. . . .

(c) (aa) In deciding whether a regulation [which limits] the practice of a trade

Indeed, as the ECHR has recognized ... laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion. ...

The citizen is entitled to have the state abide by constitutional standards of precision whenever it enacts legal dispositions. In the criminal field, it may be thought that the terms of the legal debate should be outlined with special care by the State. In my opinion, however, once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.

Appeal dismissed.

B. Justification

1. The *Oakes* Test

The Supreme Court of Canada's first comprehensive treatment of the meaning of s. 1 came in *R v. Oakes*, [1986] 1 SCR 103; 26 DLR (4th) 200. *Oakes* remains the primary referent for this second stage of Charter adjudication.

R v. Oakes

[1986] 1 SCR 103; 26 DLR (4th) 200

[Section 8 of the Narcotic Control Act, RSC 1970, c. N-1 created a "rebuttable presumption" that once the fact of possession of a narcotic had been proven, an intention to traffic would be inferred unless the accused established the absence of such an intention. In *Oakes* the accused challenged this "reverse onus" provision, arguing that it violated s. 11(d) of the Charter. After finding that s. 8 did violate s. 11(d) of the Charter, the Court then went on to discuss whether the limit could nonetheless be upheld under s. 1.]

DICKSON CJC (Chouinard, Lamer, Wilson, and Le Dain JJ concurring): ... It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms—rights and freedoms which are part of the supreme law of Canada. As Wilson J stated in *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 SCR 177, at p. 218, 17 DLR (4th) 422: "It is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter."

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society." Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, [[1984] 2 SCR 145; 11 DLR (4th) 641].

The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness," "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case. ...

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion." Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. ... A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 352, 18 DLR (4th) 321. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, 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. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter 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 measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[The Court then went on to apply the above analysis to the reverse onus provision found in s. 8 of the Narcotic Control Act. The Court concluded that the objective of protecting society from the ills associated with drug trafficking was of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases and, moreover, that the seriousness of the problem was to a large extent self-evident. The federal government had submitted some evidence to establish the seriousness of the problem of drug trafficking. The evidence included several governmental reports on the problems of drug abuse and an International Protocol on the international trade in and use of opium that Canada had signed. However, the Court concluded that the means chosen to implement this objective—that is, the reverse onus—failed the first step of the proportionality test. The means were not rationally connected to the objective of curbing drug trafficking because there was no rational connection between possession of a small quantity of narcotics and an intent to traffic.]

Appeal dismissed.

NOTES AND QUESTIONS

1. *Pressing and Substantial Purpose.* As you read the cases in subsequent chapters you will see that courts rarely find that a restriction fails this first step of the *Oakes* test. *R v. Big M Drug Mart Ltd.*, [1985], 1 SCR 295; 18 DLR (4th) 321 (which is included in chapter 19, Freedom of Religion) is an exceptional case. In *Big M* the Supreme Court of Canada found that the law's purpose, which was to compel a religious practice (observance of Sunday as the Sabbath), could not be considered "pressing and substantial." In the Court's view, such a purpose directly contradicted the constitutional commitment to religious freedom.

The courts seem prepared to regard almost any purpose (that is not a direct denial or contradiction of the right) as "pressing and substantial." They prefer to take account of the insubstantial character of a restriction's purpose at the proportionality stage of the *Oakes* test. Why do you think they have taken this approach?

In *Big M* the Court also said that in defending a law under s. 1 the government could not rely on a purpose different from that which animated the law at the time of its

enactment. According to the Court: "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." Any other view would mean that "[l]aws assumed valid on the basis of persuasive and powerful authority could be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage re-litigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations." Are the Court's concerns justified? In *R v. Butler*, [1992] 1 SCR 452; 89 DLR (4th) 449 (found in chapter 20, Freedom of Expression) the Court said that the rule against "shifting purpose" does not preclude a shift in the emphasis of the law's general purpose. When you read *Butler*, consider whether this distinction between "shifting purpose" and "permissible shift in emphasis" is workable.

2. *Rational Connection and Minimal Impairment.* While the first step of the *Oakes* test focuses on the purpose of the impugned law, the next two steps consider the means chosen to advance that purpose—their effectiveness and their scope. The rational connection and minimal impairment tests are closely related. A law that does not rationally advance the pressing and substantial purpose for which it was enacted can be described as unnecessarily restricting the right or freedom. Similarly, a law that restricts the right or freedom more than is necessary to advance its pressing purpose (that does not minimally impair the freedom) can be described as in part ineffective or irrational.

When a court finds that a restriction cannot be justified under s. 1, its decision is most often based on the minimal impairment requirement, and occasionally on the rational connection test. It is easy to understand why these tests have come to play such a central role in the courts' assessment of limits. Both tests can be presented as value-neutral—as involving a technical assessment of legislative means. A law may be struck down by the court not because its purpose is objectionable, but simply because the means chosen to advance that purpose are ineffective or will impair the protected freedom unnecessarily.

However, it is far from clear that these tests involve nothing more than an assessment of the effectiveness of means, divorced entirely from any judgment about the purpose of the law or the value of the restricted activity.

The rational connection test must require something more than that the law's means not be wholly irrational in relation to the law's ends—or wholly ineffective to achieve those ends. Indeed, it would be difficult to attribute to a law a purpose that seemed unconnected to its provisions. Instead, the rational connection test must involve some sort of effectiveness threshold—that the law reasonably advances the pressing and substantial purpose for which it was enacted. If rationality or effectiveness is a relative judgment, then there will be plenty of space for other factors, such as the importance of the law's objective and the value of the restricted activity, to affect the court's judgment that the law is (in)sufficiently effective or rational in the advancement of its purpose.

The intrusion of balancing seems even more difficult to avoid in the case of the minimal impairment test. It will be very rare that an alternative measure that is less rights restrictive will advance the law's substantial and compelling purpose as completely or as effectively. A law will fail the minimal impairment test when the court considers that a small or debatable decrease in the law's effectiveness in achieving its substantial and pressing purpose will significantly reduce its interference with the protected right.

The fact that judgments about rational connection and minimal impairment almost invariably involve a balancing or trade-off between competing interests may explain why the final "balancing" step of the *Oakes* test seldom plays more than a formal role in the s. 1 analysis.

3. *The Final Balance.* In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; 120 DLR (4th) 12, Lamer CJC, writing for five members of the Court, added a refinement or clarification to the third part of the *Oakes* proportionality test. This last component of the *Oakes* test, which is referred to as the "deleterious effects" test or the "disproportionate effects" test, requires a proportionality between the effects of the measures that are responsible for limiting the Charter right or freedom, and the objective that has been identified as of "sufficient importance." The *Dagenais* refinement requires that in applying this test, courts consider not only the objective of the impugned law but also its salutary effects. The rationale for refining the test in this way is set out in the following extract:

> As Dickson CJ stated in *Oakes* ... "[e]ven 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." In many instances, the imposition of a measure will result in the full, or nearly full, realization of the legislative objective. In these situations, the third step of the proportionality test calls for an examination of the balance that has been struck between the objective in question and the deleterious effects on constitutionally protected rights arising from the means that have been employed to achieve this objective. At other times, however, the measure at issue, while rationally connected to an important objective, will result in only the partial achievement of this object. In such cases, I believe that the third step of the second branch of the *Oakes* test requires both that the underlying *objective* of a measure and the *salutary effects* that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the *objective itself* (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects. ...
>
> In my view, characterizing the third part of the second branch of the *Oakes* test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures,*

The *Dagenais* requirement that the actual salutary effects of the law be considered may be relevant in cases where the challenged law may not be completely successful in achieving the objectives for which it was enacted. Such was the case in *Dagenais* itself, which involved a publication ban ordered for the purpose of guaranteeing a fair trial but which, in operation, was found to have only limited effect given the difficulty of effectively enforcing such bans in light of technological advances.

With respect to the overall structure of s. 1 analysis, the first step of the *Oakes* test involves a general judgment about the significance of the law's purpose. The next two steps involve a general assessment of the effectiveness of its means. At the final stage of the test the court is to look at the means and ends of the law together and compare the law's actual benefit or value (the value of what the law achieves and not simply the value of its general purpose) with its actual costs (based on the value of the restricted activity and not just the value of the right or freedom in the abstract). In actual practice, the courts have given relatively little weight to this final step of the *Oakes* test, and in the majority of cases the crucial s. 1 determinations are made at the minimal impairment stage of the *Oakes* test. The final step of the s. 1 analysis tends to be conclusory, with courts simply repeating earlier findings.

One notable, recent exception is *R v. Sharpe*, [2001] 1 SCR 45; 194 DLR (4th) 1 (which concerned the regulation of child pornography and is discussed in chapter 20, Freedom of Expression). In *Sharpe*, McLachlin CJC, writing for a majority of the Court, found that part of the restriction at issue did not satisfy the final requirement of the s. 1 analysis:

> In the vast majority of the law's applications, the costs it imposes on freedom of expression are outweighed by the risk of harm to children. ... However, the prohibition also captures in its sweep materials that arguably pose little or no risk to children, and that deeply implicate the freedoms guaranteed under s. 2(b). ... Consequently, the law's application to these materials, while peripheral to its objective, poses the most significant problems at the final stage of the proportionality analysis."

Could McLachlin CJC have reached the same result using the minimal impairment test? Is the Court signaling that it is going to be more explicit in its balancing of competing interests by making greater use of this final step of the *Oakes* test?

4. *Standard of Proof.* In *Oakes* the Court stated that the justification of a limit on a Charter right or freedom must be proved on a balance of probabilities, the civil rather than criminal standard of proof. This reference to standard of proof suggests that the limitation issue is (principally) a factual one. Is this true? The suggestion that factual determinations are key fits with the Court's focus on the rational connection and minimal impairment tests, both of which appear to involve judgments about the effectiveness rather than the value of the restriction. Yet most contemporary defences of judicial review regard the court as a "forum of principle," a place where basic value issues are addressed. If the key issues to be resolved under s. 1 are factual, should the courts not give significant space to the legislature's judgment? Or are the courts better equipped to make factual determinations?

In *Oakes*, Chief Justice Dickson indicated that it might not always be necessary for the government to provide evidence—"that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident." Moreover, as will be discussed below,

courts are often prepared to defer to the legislative reading of ambiguous social science evidence.

5. *The Origins of the Oakes Test.* The *Oakes* test appears to be drawn from a number of sources, including the US Supreme Court judgment in *Central Hudson and Gas v. Public Service*, 447 US 557; 100 S Ct. 2343 (1980), which discussed the protection of commercial expression under the American Bill of Rights. After noting that the right to free speech in the Bill of Rights did not prevent the government from restricting deceptive commercial expression, Justice Powell went on to say that:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the government interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive. Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. ... The second criteria recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." ... The regulatory technique may extend only as far as the interest it serves. The state cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interests as well. ...
>
> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. ... Next we ask whether the asserted government interest is substantial. If both inquires yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

It seems ironic that the Supreme Court of Canada might have based its s. 1 analysis on an American Bill of Rights case, a source that the Court has stated must be used with care because the US document lacks a limitations clause.

2. The Subsequent Development of the *Oakes* Test: Context and Deference

Two important and closely related developments in the Supreme Court of Canada's s. 1 analysis have occurred since the introduction of the *Oakes* test. The first is the emergence of the contextual approach to the assessment of limits under s. 1. This approach requires that courts assess the value or significance of the right and its restriction in their context rather than in the abstract. For example, when deciding whether a legislative restriction on hate speech is justified under s. 1, courts should not simply balance the value of the restriction's general purpose (that is, preventing the spread of hatred) against the value of free expression. Instead they should compare or balance the value of what the restriction achieves in practice—its likely impact on the spread of hatred—against its actual cost to

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PROPORTIONALITY IN CANADIAN AND GERMAN CONSTITUTIONAL JURISPRUDENCE

I *Oakes and the German model*

The Canadian Charter of Rights and Freedoms[1] had been in force for not more than four years when the Supreme Court of Canada ultimately found the answer to the question of how to interpret the limitation clause in s. 1. The answer given in *R. v. Oakes*[2] was in short: legality and proportionality.[3] The first component, legality, had a clear basis in the text of s. 1 ('prescribed by law'), whereas the second, proportionality, appears to be a genuine interpretation of the words 'reasonable limits [...] as can be demonstrably justified in a free and democratic society.' In his opinion, Chief Justice Dickson offered a full conceptual framework for the requirement of proportionality, even though most doctrinal innovations develop over time until they find their ultimate shape. This framework, the so-called *Oakes* test, has been applied by the Supreme Court for two decades, although its components were clarified or modified later on, and its original rigour mitigated in certain types of cases.[4] Justice Iacobucci had an important part in this development.[5]

The question of whether Chief Justice Dickson, in writing the *Oakes* opinion, was aided by foreign examples or developed the test completely on his own appears open. It is true that some of the language in *Oakes* resembles the US Supreme Court opinion in *Central Hudson Gas &*

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

2 [1986] 1 S.C.R.103 [*Oakes*].

3 See Lorraine Weinrib, 'Canada's *Charter of Rights*: Paradigm Lost?' (2002) 6 Rev.Const.Stud. 119.

4 Ibid. See also Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1' (2006) 34 Sup.Ct.L.Rev. (2d) 501 [Choudhry, 'Real Legacy'].

5 See, *e.g.*, *RJR MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at paras. 179–92; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 108 *et seq.*; *M. v. H.*, [1999] 2 S.C.R. 3 at paras. 75 *et seq.*; *Delisle v. Canada*, [1999] 2 S.C.R. 989; *Figueroa v. Canada (A.G.)*, [2003] 1 S.C.R. 912.

Electric Corp. v. Public Service Commission of New York,[6] a commercial speech case decided in 1980. But *Central Hudson* was not a trend-setting decision that gained much influence outside commercial speech problems, nor is its proportionality test as elaborated and complete as the one suggested by Chief Justice Dickson. Although the US Supreme Court often resorts to balancing, it has not developed a concept of proportionality, let alone turned it into a doctrinal test comparable to the *Oakes* test. In a number of recent decisions Justice Breyer has shown an interest in introducing proportionality analysis into US constitutional law,[7] but without convincing the majority of his fellow justices.

There is, however, one jurisdiction that could have served as a model, namely Germany.[8] Here the proportionality test has been applied since the late 1950s, whenever the Constitutional Court has had to review laws limiting fundamental rights, or administrative and judicial decisions applying such laws. From Germany the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe. Likewise, it is in use in the European Court of Human Rights and in the European Court of Justice. The German and Canadian proportionality tests differ slightly in their terminology but look more or less alike in substance. However, a closer comparison reveals some significant differences in how the tests are applied. Perhaps the most conspicuous difference is that in Canada, most laws that fail to meet the test do so in the second step, so that not much work is left for the third step to do, whereas in Germany, the third step has become the most decisive part of the proportionality test. An examination of the difference can shed some light on the strengths and weaknesses of the two approaches.

II *The development of proportionality in Germany*

The proportionality test is older than the German Constitution. It was first developed by German administrative courts, mainly the Prussian Oberverwaltungsgericht, in the late nineteenth century and applied to police measures that encroached upon an individual's liberty or property in cases where the law gave discretion to the police or regulated police

6 447 U.S. 557 (1980) [*Central Hudson*].

7 See, e.g., *Turner Broadcasting System. v. Federal Communication Commission*, 520 U.S. 180 (1997); *Nixon v. Shrink Missouri Government*, 528 U.S. 377 (2000); *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); Paul Gewirtz, 'Privacy and Speech' [2001] Sup.Ct.Rev. 139.

8 See generally David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2005) at 162 [Beatty, *Ultimate Rule*]; Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d ed. (Durham, NC: Duke University Press, 1997) at 46 [Kommers, *Constitutional Jurisprudence*].

activities in a rather vague manner.[9] Here the principle of proportionality served as an additional constraint on police action. The action required a lawful purpose. The means adopted by the police *vis-à-vis* the citizen had to be suitable to reach the purpose of the law. If a less intrusive means to achieve the end of a law was available, this means had to be applied. In some cases, the courts asked, in addition, whether a proper balance had been struck between the intrusiveness of the means and the importance of the goal pursued. A failure to comply with these requirements rendered police actions unlawful.

Under the Basic Law adopted in 1949, the Constitutional Court, which was established in 1951, soon began to transfer this test into constitutional law and applied it to laws limiting fundamental rights. But, in contrast to the Canadian context, the Court in its early decisions neither explained why the Basic Law required limitation of rights to be proportional nor specified how the principle of proportionality operated. The principle was introduced as if it could be taken for granted.[10] The first detailed explanation of what the principle requires and how it operates was given in a landmark case concerning freedom of profession (art. 12).[11] Here the principle of proportionality appeared as a tool that helped to cope with some difficulties caused by the unusual language of art. 12. In a later decision, also concerning art. 12, the test developed in the *Pharmacy Case* is described as 'the result of a strict application of the [general] principle of proportionality when the common weal requires infringements of the freedom of profession.' The way in which the principle operates is then explained in detail.[12]

It took until 1963 for the Court, in a case concerning the right to physical integrity (art. 2(2)), to recognize the applicability of the principle in all cases where fundamental freedoms are infringed.[13] Another two years passed before the Court explained where it finds the textual basis for the principle: '[i]t follows from the principle of the rule of law [guaranteed

9 Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Göttingen: Schwarz, 1981) at 6; Barbara Remmert, *Verfassungs- und verwaltungsgeschichtliche Grundlagen des Übermaßverbots* (Heidelberg: Müller, 1995).

10 The first decision that mentions the principle of proportionality concerns an election law of the state of North Rhine Westphalia, see BVerfGE 3, 383 at 399 (1954). In a later case the Court quotes an earlier decision to support the application of the principle of proportionality: see BVerfGE 1, 167 at 178 (1952). However, this decision simply states that, even in times of emergency, limitations of rights may not go further than absolutely necessary.

11 BVerfGE 7, 377 (1958) [*Pharmacy Case*]. Excerpts in English translation cited to Kommers, *Constitutional Jurisprudence*, supra note 8 at 274, and Norman Dorsen *et al.*, eds., *Comparative Constitutionalism: Cases and Materials* (St. Paul, MN: Thomson West, 2003) at 1204 [Dorsen *et al.*, *Comparative Constitutionalism*].

12 BVerfGE 13, 97 at 104 (1961). The test is explained at 108.

13 BVerfGE 16, 194 at 201 (1963).

in art. 20], even more from the very essence of fundamental rights, which are an expression of the citizens' general claim to freedom vis-à-vis the state and which may be limited by public power only insofar as it is absolutely necessary in order to protect public interests.'[14] In recent years, proportionality has often been called a principle of constitutional law.[15] No elaboration of what precisely the source of proportionality is has ever been given. Nor has the Court elaborated how this principle flows from the rule of law or the essence of fundamental rights.[16] The reason for this taciturnity may have been that in Germany, as opposed to Canada, in the early years the Court was not aware of the prominent role proportionality would play in the future. When this became apparent, the principle had already been established, so that further reasoning seemed unnecessary.

Without such an attempt to elaborate, the proportionality principle seems more remote from the text of the constitution in Germany than in Canada. What appears to be an interpretation of s. 1 of the Charter in Canada looks like an additional check on limitations, which supplements the textual provisions in Germany. The German Basic Law contains only a few safeguards applying to any limitation of a fundamental right, the most important ones being that every law limiting a fundamental right must be a general law (art. 19(1)) and that no limitation may affect the very essence of the fundamental right (art. 19(2)). The Basic Law then attaches special limitation clauses to most rights and freedoms in the Bill of Rights. Some of these clauses content themselves with a statement that limitations are only allowed 'by law or pursuant to law,' without adding further constraints. This is true, for instance, for rights as important as the right to life and physical integrity (art. 2(2)). Other limitation clauses contain further checks on purpose, conditions, or means of limitation. But not many laws are found to be unconstitutional because they violate the written limitation clauses. Instead, it is the unwritten principle of proportionality that carries the main burden of fundamental rights protection in Germany.

This is not to say that the principle of proportionality is an illegitimate invention of the Constitutional Court. Had the Court felt a necessity to argue that proportionality flows from the Bill of Rights in the

14 BVerfGE 19, 342 at 348 (1965).

15 See, *e.g.*, BVerfGE 95, 48 at 58 (1996).

16 The path-breaking book is Peter Lerche, *Übermaß und Verfassungsrecht. Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und Erforderlichkeit*, 2d ed. (Cologne: Heymanns, 1999). (The first edition of this work appeared in 1961.) See also Bernhard Schlink, *Abwägung im Verfassungsrecht* (Berlin: Duncker & Humblot, 1976) [Schlink, *Abwägung*]; Klaus Stern, 'Zur Entstehung und Ableitung des Übermaßverbots' in Peter Badura & Rupert Scholz, eds., *Festschrift für Peter Lerche* (Munich: Beck, 1993) 165.

Basic Law, it would not have encountered great difficulties. As Chief Justice Dickson did in his purposive approach in *Oakes*,[17] the Constitutional Court could have started from the enhanced importance that was attributed to fundamental rights after the Nazi regime and World War II. According to art. 1, all fundamental rights are rooted in the principle of human dignity. Unlike previous German constitutions, the Basic Law places these rights above the law and endows them with binding force for the legislature. In the *Lüth* case, a landmark decision that revolutionized the understanding of fundamental rights in Germany,[18] the Court elevated them to the rank of highest values of the legal system, which are not only individual rights, but also objective principles. The conclusion drawn from this assumption was that they permeate the whole legal order; they are not limited to vertical application but also influence private law relations and function as guidelines for the interpretation of ordinary law. The same line of argument could have led to the conclusion that it would be incompatible with the importance attributed to individual freedom that the legislature be entitled to limit fundamental rights until it reaches the ultimate borderline of its very essence.

III *Different approaches: The objective*

In essence, both jurisdictions follow the same path when they apply the proportionality test. Since the test requires a means–ends comparison, both courts start by ascertaining the purpose of the law under review. Only a legitimate purpose can justify a limitation of a fundamental right. The three-step proportionality test follows. While the Canadian Court requires a rational connection between the purpose of the law and the means employed by the legislature to achieve its objective in the first step, the German Court asks whether the law is suitable to reach its end. In the second step, the Canadian Court asks whether, in pursuing its end, the law minimally impairs the fundamental right, whereas the German Court asks whether the law is necessary to reach its end or whether a less intrusive means exists that will likewise reach the end. The third step in both countries is a cost–benefit analysis, which requires a balancing between the fundamental rights interests and the good in whose interest the right is limited. In Germany it is

17 Supra note 2 at para. 28.

18 BVerfGE 7, 198 (1958). English translations appear in *Decisions of the Bundesverfassungsgericht*, vol. 2, part I (Baden-Baden: Nomos, 1998) at 1; Kommers, *Constitutional Jurisprudence*, supra note 8 at 361 (excerpts); Vicki C. Jackson & Mark Tushnet (eds.), *Comparative Constitutional Law* (New York: Foundation, 1999) at 1403 (excerpts); Dorsen, *Comparative Constitutionalism*, supra note 11 at 824.

mostly called 'proportionality,' in the narrower sense, but is also called 'appropriateness,' 'reasonable demand' (*Zumutbarkeit*), and so on.[19]

Where do the two jurisdictions differ? The first difference appears when the preliminary question is asked: What is the objective of the law that limits a fundamental right? While the Supreme Court of Canada in *Oakes* requires an objective 'of sufficient importance to warrant overriding a constitutionally protected right of freedom,' or a 'pressing and substantial' concern,[20] the German Constitutional Court requires a 'legitimate purpose.' By *legitimate* the Court understands a purpose not prohibited by the Constitution. No additional element, such as a 'sufficient importance' or 'pressing need,' is required. Certainty about the purpose of the law is indispensable in carrying out the means–ends analysis during the succeeding steps of the proportionality test. But ascertaining the purpose is not part of the proportionality test; rather, it serves as the test's basis and starting point. The question of whether the objective chosen by the legislature is important enough to justify a certain infringement of a fundamental right is, of course, crucial for the German Court as well. But it appears at a later stage of the test, namely in the third step, where the Court asks whether a fair balance between competing interests has been struck. As a result, hardly any law fails at this preliminary step. Cases in which the legislature pursues a constitutionally prohibited purpose (*e.g.*, racial discrimination) are extremely rare.

The German Court does not offer an explanation for the narrow understanding of purpose within the framework of the proportionality test. But one can infer two considerations from the reasoning. First, the Court holds that in a democracy the legislature is entitled to pursue any purpose, provided it is not excluded by the constitution. The importance of the purpose is not a condition for legislative action. What is important enough to become an object of legislation is a political question and has to be determined *via* the democratic process. Second, importance is regarded as a correlational notion that cannot be determined in abstract terms. Hence, the question of whether a goal is sufficiently important to justify certain limitations of a right can be answered only by following the steps of the proportionality test. Raising this question in connection with the purpose would be regarded as a premature anticipation of the final balance. Yet the difference seems to disappear in practice. It is quite instructive to see that almost no Canadian law fails because of an insufficient purpose. As in Germany, a law is deemed unconstitutional in Canada if its purpose is incompatible with

19 Good examples of the operation of the test are, *e.g.*, BVerfGE 81, 156 at 188 (1990); BVerfGE 90, 145 (1994) [*Cannabis case*]; BVerfGE 91, 207 at 222 (1994).

20 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352.

the Constitution.[21] But any lawful purpose is regarded as a sufficient purpose.

Determining the purpose of a law has not been a particularly difficult part of applying the proportionality principle in Germany. Usually the legislative history contains sufficient information about the purpose. Difficulties may arise with last-minute compromises in the legislature, particularly in the Mediation Committee of the two Houses of Parliament, when such compromises are adopted in the plenum without debate. But the impossibility of finding out what the legislature had in mind when it enacted a certain law is a rare exception.[22] This is not to say that this stage is of little importance. The distinction between ends and means can be quite difficult. From a broader perspective, a narrowly defined end may appear as a means for a more abstract purpose. Yet this will rarely affect the legitimacy of the purpose. It plays a prominent role, however, when it comes to determining the competing values or interests in the process of balancing in the third step.

In the first step, the difference between the two countries seems to be merely semantic, and not many laws fail at this level.[23] Its function is to eliminate the small number of runaway cases. Likewise, the second step seems to differ only in terms of terminology between the two jurisdictions. That a particular means is 'necessary' to reach the goal of the law indicates, in German constitutional jurisprudence, that less intrusive means are not available, which is simply a different formulation for 'minimal impairment.' By the same token, in describing 'minimal impairment,' Canadian authors often use the term 'necessary.'[24] The information about less intrusive means is usually provided by the party who challenges a law on this ground. However, it is interesting to observe that in Canada most laws that are found to be unconstitutional fail at this step. In Germany, the proportion of laws failing at the second step is considerably larger than the number of laws failing at the first step, but far smaller than in Canada. The vast majority of laws that failed to pass the proportionality test in Germany do so at the third step.

21 See Joel Bakan *et al.*, eds., *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 759.

22 For an example see BVerfGE 9, 291 (1959). Likewise, the problem of shifting purposes has not arisen in Germany.

23 A nice example of an unsuitable means was a hunting law that required a gun-shooting test for falconers: falconry is not hunting falcons with a gun but hunting other animals with a falcon. See, BVerfGE 55, 159 (1980).

24 See, *e.g.*, Bakan *et al.*, *Canadian Constitutional Law*, supra note 21 at 760.

IV *More differences: The second step*

Several factors may explain why the second step has gained less prominence in Germany than in Canada. First, the importance of the law's objective does not play a role at this stage. The objective is accepted as lawful, and the only question is whether the objective could have been reached as effectively by milder means. Second, the Constitutional Court does not require that the means chosen by the legislature fully reach the objective of the law. A contribution, even a slight one, is sufficient, provided that the same contribution cannot be reached by a means that impairs the fundamental right less. The comparison of the deleterious and the salutary effects of the impugned law required by the refined *Oakes* test is not made in the second step in Germany but, rather, is reserved for the third step. Third, if the infringement consists in a financial burden imposed on the citizen (which is very often the case with laws regulating the economy and affecting freedom of profession or property), a less intrusive means can always be found: someone else pays, or the state allocates money from the budget. Hence, in these cases the test does not exclude anything. The question therefore becomes one of the appropriateness of the measure, to be decided in the third step.[25]

Moreover, the German Court has never imposed as high a burden of proof on the government as the Canadian Supreme Court did in *Oakes* when it asked for 'cogent and persuasive' evidence in connection with the 'constituent elements of a s. 1 inquiry.'[26] If it is true that *Oakes* created an 'enormous institutional dilemma' for the Court by neglecting the reality of policy making under conditions of uncertainty,[27] the German Court avoided this dilemma, since it has always emphasized that the legislature enjoys a certain degree of political discretion in choosing the means to reach a legislative objective.[28] This reflects the reality of political decision making. Usually it is not difficult to ascertain whether there are less intrusive means; it is much more difficult, however, to find out whether they would have the same or an equivalent effect.

This is particularly true when, in deciding the question of whether the means will contribute to reaching the objective, the answer depends on prognostication. The leading case is *Kalkar*, which involved the risks of atomic energy plants.[29] In the absence of evidence about new atomic

25 See BVerfGE 77, 308 at 334 (1987).

26 *Oakes*, supra note 2 at para. 68.

27 Choudhry, 'Real Legacy,' supra note 4 at 503, 524.

28 See, *e.g.*, BVerfGE 30, 250 at 263 (1971).

29 BVerfGE 49, 89 at 130 (1978). Excerpts in English translation cited to Kommers, *Constitutional Jurisprudence*, supra note 8 at 139; Dorsen, *Comparative Constitutionalism*, supra note 11 at 239.

technology, the Court refused to substitute judicial opinions for political ones; but it combined this deference with a constitutional duty on the legislature to observe the development of this technology and, if necessary, to amend the law. In the *Codetermination Case*, the Court clarified its position.[30] On the one hand, uncertainty about future developments, even in matters of great import, cannot justify a prohibition to legislate. On the other hand, uncertainty alone cannot justify exempting a political realm from judicial control. The Court then developed a scale of scrutiny that ranges from whether the legislature's prognostications are evidently wrong (*Evidenzkontrolle*) to a reasonableness test (*Vertretbarkeitskontrolle*) to strict scrutiny (*intensivierte inhaltliche Kontrolle*), depending on the nature of the policy area, the possibility of basing the decision on reliable facts, and the importance of the constitutionally protected goods or interests at stake. The Court does not hesitate to collect the facts on its own behalf if necessary.[31]

The strictness of *Oakes* can perhaps be explained by Chief Justice Dickson's assumption that the rights and freedoms guaranteed by the Charter are not absolute, but that limits on them are 'exceptions' and can be justified only by 'exceptional criteria.'[32] It would be difficult to find similar language in the jurisprudence of the German Court. From the beginning, limitations of fundamental rights were regarded as normal, because all rights and freedoms can collide or can be misused. Harmonization of colliding rights and prevention of abuses of liberty are normal tasks of the legislature. The function of constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity. Some later modifications of the *Oakes* test seem to take this into account.[33]

30 BVerfGE 50, 290 at 331 (1979) [*Codetermination Case*]. Excerpts in English translation cited to Kommers, *Constitutional Jurisprudence*, supra note 8 at 267. For equality cases cf. BVerfGE 88, 87 at 96 (1993) [*Transsexual Case*].

31 See Klaus Jürgen Philippi, *Tatsachenfeststellungen des Bundesverfassungsgerichts* (Cologne: Heymanns, 1971); Brun-Otto Bryde, 'Tatsachenfeststellungen und soziale Wirklichkeit in der Rechtsprechung des Bundesverfassungsgerichts' in Peter Badura & Horst Dreier, eds., *Festschrift 50 Jahre Bundesverfassungsgericht*, vol. 1 (Tübingen: Mohr Siebeck, 2001) 533. In cases of judicial review of legislation, the Court usually invites statements from agencies or offices such as the Statistical Bureau and from interested or informed institutions or societal groups. Parties to a lawsuit are given the opportunity to express their opinion on these statements. In some cases the Court hears experts whom it selects independently from the parties to the lawsuit.

32 *Oakes*, supra note 2 at para. 65.

33 Compare *Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713 [*Edwards Books*]; *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927; *RJR MacDonald Inc. v. Canada* (A.G.), [1995] 3 S.C.R. 199.

In *Edwards Books* the Canadian Court mentions for the first time that protecting a 'vulnerable' or 'not ... powerful group in society' may justify a limitation *vis-à-vis* those who profit from this vulnerability. The Court adds, however, that the legislature is not constitutionally obliged to furnish protection, 'only that it may do so if it wishes.'[34] The German Constitutional Court went further in this direction. Starting in 1975, it recognized a constitutional duty to protect fundamental rights not only *vis-à-vis* the state but also *vis-à-vis* threats stemming from private parties or societal forces.[35] Since threats of this sort are themselves a result of the exercise of fundamental rights, this duty can be fulfilled only by limiting one group's rights in order to protect the rights of another. Consequently, a law can violate the Constitution not only when it goes too far in limiting a fundamental right (*Übermaßverbot*) but also when it does too little to protect a fundamental right (*Untermaßverbot*).[36]

A special case is private law legislation. Unlike its public law counterpart, such legislation concerns relationships between individuals as opposed to the relationship between the individual and the state. With respect to fundamental rights, public law relationships are asymmetrical: only individuals have fundamental rights, whereas the state is bound by these rights. Private law relationships, on the other hand, are symmetrical: both individuals have fundamental rights. Private law legislation, therefore, will often require a reconciliation of two competing private interests, both of which are protected by fundamental rights. This means that the protection of the endangered right can be ensured only by a limitation of other constitutionally protected rights. In such a situation, the question posed in the second step – whether or not a limitation of a fundamental right went too far – cannot be answered without asking whether the protection given to the endangered right was sufficient. The Canadian Court apparently solves this problem by lowering the standards of scrutiny for minimal impairment. The German Court

34 *Edwards Books*, ibid.

35 BVerfGE 39, 1 at 42 (1975) [*Abortion I*]. Excerpts in English translation appear in Kommers, *Constitutional Jurisprudence*, supra note 8 at 336; Jackson & Tushnet, *Comparative Constitutional Law*, supra note 18 at 115; Dorsen, *Comparative Constitutionalism*, supra note 11 at 542. See Dieter Grimm, 'The Protective Function of the State' in Georg Nolte, ed., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137; Dieter Grimm, 'Human Rights and Judicial Review in Germany' in David M. Beatty, ed., *Human Rights and Judicial Review* (Dordrecht: Martinus Nijhoff, 1994) 267 at 279; Beatty, *Ultimate Rule*, supra note 8 at 145.

36 BVerfGE 88, 203 at 254 (1993) [*Abortion II*]. Excerpts in English translation appear in Kommers, *Constitutional Jurisprudence*, supra note 8 at 349; Jackson & Tushnet, *Comparative Constitutional Law*, supra note 18 at 134.

has found that here, the means-ends relation is no longer at stake; hence, the second step furnishes no answer. The Court solves this problem in the third step.

V *A wide gap: Balancing*

The most striking difference between the two jurisdictions is the high relevance of the third step of the proportionality test in Germany and its more residual function in Canada. Here the German Court argues at length, whereas the Canadian Court mostly presents a 'résumé of previous analysis.'[37] How can this difference be explained? The analysis to be made in the third step is described differently in the two jurisdictions. As Chief Justice Dickson put it in *Oakes*, the final step requires 'proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."'[38] In its refined form in *Dagenais*, the test requires 'both that the underlying objective of a measure and the salutary effects that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms.'[39] The German Court weighs the seriousness of the infringement against the importance and urgency of the factors that justify it. In other words, the Court compares the loss on the side of the infringed right if the law is upheld with the loss on the side of the value protected by the law if the fundamental right prevails.

This comparison differs from the assessment made in the first two steps of the proportionality test. These steps are confined to a strict means–ends examination. The idea is that those legislative means that are not necessary to reach the objective of the law cannot justify a limitation of fundamental rights. In the third step, the Court leaves the means–ends analysis of the first two steps behind. Here the objects of the comparison change and the scope of analysis broadens. The comparison is now between the loss for the fundamental right, on the one hand, and the gain for the good protected by the law, on the other, which will itself very often enjoy constitutional recognition. This balance is not an

37 Frank Iacobucci, 'Judicial Review by the Supreme Court of Canada under the *Canadian Charter of Rights and Freedoms*: The First Ten Years' in David M. Beatty, ed., *Human Rights and Judicial Review* (Dordrecht: Martinus Nijhoff, 1994) 121.

38 *Oakes*, supra note 2 at para. 70.

39 *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at 887. For a similar case in Germany see BVerfGE 35, 202 (1973) [*Lebach*]. Excerpts in English translation appear in Kommers, *Constitutional Jurisprudence*, supra note 8 at 416; Basil S. Markesinis, *The German Law of Torts: A Comparative Introduction*, 3d ed. (Oxford: Clarendon Press, 1997) at 390.

abstract one. The Constitutional Court does not recognize a hierarchy among the various fundamental rights. The balance, therefore, must be concrete or, in the Canadian terminology, contextual. One question is how deeply the right is infringed. Another question is how serious the danger for the good protected by the law is, and how likely it is that the danger will materialize. Furthermore, the degree to which the impugned law will protect the good against the danger must be measured against the degree of intrusion.

Yet this concept is by no means alien to the Canadian Court. Already in *Oakes*, Chief Justice Dickson admitted that a full protection of fundamental rights is impossible without the third step. '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.'[40] The similarity to the German approach becomes even clearer in *Thomson Newspapers v. Canada (A.G.)*,[41] where the Court states that the third step of the proportionality test performs a role fundamentally distinct from the previous steps:

> The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. . . . The third stage of the proportionality analysis provides an opportunity to assess . . . whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.[42]

The explanation for this gap between the Court's reasoning and its practice must be sought in the fact that the elements relevant to the third step have already been dealt with in previous stages. The importance of the objective has generally been determined in the preliminary step, where the Court not only ascertains the purpose of the law but asks, in addition, whether it is sufficiently 'pressing and substantial' to justify a limitation of Charter rights. The effects of the infringement on the beneficiaries of the protection are considered in connection with the existence of an infringement in the two prior steps of the test, so that not much remains to be said when the Court reaches the third step. Consequently, the source of unconstitutional limitations always has been found in earlier stages.

The outside observer gets the impression that the Canadian Supreme Court avoids the third step out of fear that a court might make policy decisions at this stage rather than legal decisions. Constitutional scholars

40 *Oakes*, supra note 2 at para.71.
41 [1998] 1 S.C.R. 877 [*Thomson*].
42 Ibid. at para. 125.

support the Court in this attitude.[43] Yet, in practice, the Court's dealing with the second step looks much more value laden than that of the German Court. Take as an example the lengthy considerations of Chief Justice Dickson in *Keegstra*, or the comments of then Justice McLachlin in her dissenting opinion.[44] They contain much more than what would have been necessary in order to answer the question posed in the second step, to wit, whether there are alternative means that would reach the objective of the law as effectively as the means chosen by the legislature while imposing a lesser burden on the right limited by the law. The same is true for the kind and dimension of the danger that the law wants to cure. It is revealing that sometimes the Court uses the expression that, in view of a given danger, a law 'does not unduly restrict' a guarantee, a kind of language that is typical of the balancing process reserved for the third step in Germany.

If indeed the attempt to avoid policy considerations and value judgements is responsible for the reluctance to enter the third step, the Court risks self-deception when all the value-oriented considerations have been made under the guise of a seemingly value-neutral category. The interesting question, therefore, is whether the third step, properly understood, really forces the Court to leave the legal realm and turn to political considerations. Fears like this do not exist only in Canada; there are critics in Germany as well. Bernhard Schlink is perhaps the most prominent one.[45] He accepts balancing at the third stage, when the Constitutional Court reviews acts of the executive and decisions of lower courts, but he wants to exclude it when legislative acts are at stake. He argues that balancing conflicting interests, setting priorities, and allocating resources is a genuine political function. In his view, courts leave the legal realm and usurp this function when they do the balancing themselves. Critics, however, are a small minority in Germany, and balancing is constantly practised by the judiciary.

VI *Justified concerns?*

My answer to the criticism that the third step is policy laden is twofold. First, I am of the opinion that without the third step the proportionality test, properly understood, would be unable to fulfil its purpose, namely,

43 See, *e.g.*, Peter W. Hogg, 'Section 1 Revisited' (1991) 1N.J.C.L. 1 at 22.

44 *R. v. Keegstra*, [1990] 3 S.C.R. 697.

45 Bernhard Schlink, *Abwägung*, supra note 16; Bernhard Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in Peter Badura & Horst Dreier, eds., *Festschrift 50 Jahre Bundesverfassungsgericht*, vol. 2 (Tübingen: Mohr Siebeck, 2001) 445. For a recent, slightly different warning see Frank Raue, 'Müssen Grundrechtsbeschränkungen wirklich verhältnismäßig sein' (2006) 131 ArchÖffR 79.

to give full effect to fundamental rights. This is so because the impact of an infringement of a fundamental right can be fully assessed only in the third step. The two previous steps can only reveal the failure of a law to reach its objective; they cannot evaluate the relative weight of the objective of the law, on the one hand, and the fundamental right, on the other, in the context of the legislation under review. Take the hypothetical case of a law that allows the police to shoot a person to death if this is the only means of preventing a perpetrator from destroying property. In Germany, property is itself constitutionally guaranteed; protection of property certainly is a lawful, even an important, purpose. Shooting a perpetrator to death is a suitable means of preventing him from destroying property. Since the shooting is allowed only if no other means are available, the necessity test of the second step is also passed. If one had to stop here, the balance between life and property could not be made. The law would be regarded as constitutional, and life would not get the protection it deserves.

Second, in my view, the danger of political decisions can be avoided by a careful determination of what is put into each side of the scales when it comes to balancing. It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected. For instance, a law may regulate not all speech but, rather, commercial speech regarding certain products and in certain media. The weight of the aspect of the right that has been regulated in relation to the right at large must be determined carefully. The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good. Only certain aspects of this good will be affected in a salutary way. The importance of these aspects in view of the good at large must be carefully determined, as well as the degree of protection that the measure will render.[46] If this is done accurately, the balancing process remains sufficiently linked to law and leaves enough room for legislative choice.

So a final question remains to be asked. Does it matter that the Supreme Court of Canada, provided that my analysis of its jurisprudence is correct, does less than it promises in the preliminary step of the proportionality principle, does more than it promises in the second step, and has little use for the third step? Does it indicate an inaccuracy when one step of a three-step test (with one preliminary stage) consists in a repetition of the results of the prior steps? In other words, is it sufficient that the relevant questions are asked somewhere, or is there a legal value

46 See similarly *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. 1326 ('One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue'). The German Constitutional Court has not always avoided this danger.

in raising them in a certain order? A definitive answer would require a more intimate knowledge of the Court's jurisprudence than I have. What I can conclude is that the disciplining and rationalizing effect, which is a significant advantage of the proportionality test over a mere test of reasonableness or a more or less free balancing, as in many US cases, is reduced when the four stages are not clearly separated. Each step requires a certain assessment. The next step can be taken only if the law that is challenged has not failed on the previous step. A confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.

Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship

Grégoire C. N. Webber

The "image of balance," Carl Schmitt tells us, "can be found in every aspect of intellectual life": "a balance of trade in international economics, the European balance of power in foreign politics, the cosmic [balance] of attraction and repulsion, the balance of the passions in the works of Malebranche and Shaftesbury, even a balanced diet is recommended."[1] Today, without doubt, the image of balance permeates yet another aspect of intellectual life: constitutional rights. The current stage of the history of thought in relation to constitutional rights scholarship and jurisprudence is engulfed by the discourse of balancing and proportionality.

To claim that constitutional law has entered the age of balancing—that it embraces a discourse and practice of balancing—is no exaggeration.[2] Indeed, constitutional law is now firmly settled in this age: for example, Canadian scholar David Beatty maintains that proportionality is an "essential, unavoidable part of every constitutional text" and "a universal criterion of constitutionality";[3] German scholar Robert Alexy, for his part, maintains that balancing "is ubiquitous in law"[4] and that, in the case of constitutional rights, balancing is unavoidable because "there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right."[5] Though not always versed in the language of constitutional rights scholarship or jurisprudence, even parliamentarians call for "balanced" policies with regards to constitutional rights.[6]

Despite the pervasiveness of balancing and proportionality in constitutional reasoning, it is not clear that recourse to these regulative ideas is at all helpful in resolving the difficult questions involved in struggling with rights-claims. The discourse of balancing and proportionality camouflages much of the scholar's and the court's thinking underlying rights. Calling it "doctrinally destructive nihilism," a member of the U.S. Supreme Court has charged that balancing is no more than "a convenient

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1. Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, MA: MIT Press, 1988) at 40.
2. T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale L. J. 943 at 972.
3. David M. Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004) at 162.
4. Robert Alexy, "On Balancing and Subsumption. A Structural Comparison" (2003) 16 Ratio Juris 433 at 436.
5. Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) at 74.
6. See Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, NJ: Princeton University Press, 2006) and Ronald Dworkin, "It is absurd to calculate human rights according to a cost-benefit analysis" *The Guardian* (24 May 2006).

umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences."[7] Indeed, the way in which the principle of proportionality generates particular conclusions is difficult to discern: concluding whether legislation "strikes the right balance" or is "proportionate" in relation to constitutional rights is, for the most part, asserted rather than demonstrated.

My aim in this essay is to challenge what I have called, somewhat polemically, the *cult of constitutional rights scholarship.* It strikes me that we have come to see constitutional rights only through the prism of proportionality and balancing and now fail to grasp the possibility that alternative modes and methods of rights-reasoning are even available. To illustrate this, I begin by reviewing the work of two proponents of the principle of proportionality in the hopes of coming to a better grasp of the promise these scholars rest with this mode and method of constitutional rights reasoning. Following that review, I undertake a criticism of proportionality reasoning and suggest that constitutional rights scholarship and jurisprudence should devote itself to struggling more explicitly with the difficult moral and political questions that are inescapably part of all rights-claims.

1. Proponents of the Principle of Proportionality

The principle of proportionality has taken hold of rights scholarship and jurisprudence in Europe and beyond. Indeed, it is now largely assumed that rights are not absolute, individual interests are generally opposed to or in competition with community interests, and proportionality and balancing are inherent to rights-discourse.[8] Even in the United States, where it is often assumed that rights are "absolute trumps," talk of balancing is prevalent, particularly in the jurisprudence of the First Amendment.[9] Of late, two academic projects have devoted themselves to expounding and defending the merits of proportionality and balancing. A review of the scholarship of German scholar Alexy and Canadian scholar Beatty might reveal the promise of the principle of proportionality.

This review is important, for there is much to suggest that there is no promise at all in proportionality reasoning. The method of practical reasonableness promoted by proportionality and balancing brings with it a vocabulary all its own, including "interest," "value," "cost," "benefit," "weight," "sufficient," and "adequate." The concepts of "good" (and "bad"), "right" (and "wrong"), "correct" (and "incorrect") are absent, as is the conceptual clarity associated with this vocabulary. Though one may speak of a correct (good or right) result when applying the principle of proportionality, this judgment evaluates correctness (or goodness or rightness) in a technical sense: has the principle of proportionality been correctly applied? The structure of balancing and proportionality analysis itself does not struggle (or even purport to struggle) with the *moral* correctness, goodness, or rightness of a claim;

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7. *New Jersey v. T.L.O.* 469 U.S. 325 (1985) at 369-71 (Brennan J.).

8. See, e.g., Evelyn Ellis, ed., *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart, 1999).

9. See Alexander Meiklejohn, "The First Amendment is an Absolute" (1961) Supreme Court Rev. 245 and Laurent B. Frantz, "The First Amendment in the Balance" (1962) 71 Yale L. J. 1424.

rather, its focus is on the *technical* weight, cost, or benefit of competing interests. The principle of proportionality—being formal or empty—itself would appear to make no claim to correctness in any morally significant way.

Why, then, has so much constitutional rights scholarship embraced the principle of proportionality?

a. Robert Alexy's Theory of Constitutional Rights

Constitutional rights scholarship tends to provide that legislation may infringe a right, but only to the extent necessary to pursue a pressing and legitimate objective. Rights, according to this approach, should be given full effect (be *optimized* in Alexy's lexicon), all things considered. Should it be the case that legislation is justified in not giving further effect to a right, then the infringement of the right is justified taking into account all of the circumstances.

For Alexy, constitutional rights should be understood as principles and principles should be understood as "optimization requirements."[10] He contrasts this "broad and comprehensive" account of constitutional rights with a "rule construction" of rights.[11] Understood as rules, constitutional rights are indistinguishable from other legal norms: they are, no doubt, at the "highest level of a legal system" and are of the "greatest importance," but their "structure" differs not from other legal norms.[12] Conceived as a rule, a constitutional right is a norm that is "always either fulfilled or not."[13] By contrast, if a constitutional right is conceived as a principle to be optimized, its structure changes. It has "radiating effect" and becomes "ubiquitous" in all areas of law.[14] Unlike rules, principles do not represent "fixed points in the field of the factually and legally possible."[15] Whereas the application of a rule in any given matrix is said to proceed independently of its "weight" or "background justification," the application of a principle is always *prima facie* and dependent on all the circumstances.

On this account, to claim a constitutional right against a legislative measure is to trigger an assessment whether the right has been sufficiently optimized. The claim is not that a given legislative measure is altogether impermissible. The weak *a priori* force of a constitutional right has a corollary: the question whether a right is engaged is relatively easy to secure. Given that in any one case a right may be optimized only to a minimal degree, the question of its application is less pressing; the right is merely a premise in one's reasoning, *not* the conclusion of debate. The degree of optimization will be contingent on the "weight" of the right in the circumstances, which is determined by the principle of proportionality.[16]

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10. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at ch. 3.
11. Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 Ratio Juris 131 at 131-32.
12. *Ibid.* at 132.
13. Alexy, *Theory of Constitutional Rights, supra* note 5 at 48.
14. *Ibid.* at 7, 352, 417.
15. *Ibid.* at 48 [emphasis omitted].
16. *Ibid.* at 50; and Alexy, "Balancing and Subsumption," *supra* note 4 at 435-36.

The principle of proportionality, according to Alexy, consists of three sub-principles: suitability, necessity, and proportionality in the strict sense.[17] These three sub-principles, like the principle of proportionality that they constitute, are expressions of the idea of optimization.[18] A legislative measure will not be *suitable* if it interferes with a constitutional right unless it promotes another principle. A legislative measure will not be *necessary* if, assuming two legislative measures are equally suitable, the measure which interferes least is not adopted.[19] Alexy terms the third sub-principle—proportionality in the strict sense—the "Law of Balancing" and defines it as follows: "[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other."[20]

Alexy proposes three stages for evaluating balancing: the first establishes the degree of interference with the first principle (the "constitutional right"); the second establishes the importance of satisfying a competing principle (the "competing principle"); and the third determines whether the importance of satisfying the competing principle justifies the interference with the constitutional right.[21] In short, interference with a constitutional right by legislative measures that pursue the satisfaction of a competing principle will be justified only by virtue of the importance of satisfying the competing principle. Alexy accepts that his structure provides little guidance unless it is possible to make rational judgments about the intensity of interference, degrees of importance, and their relationship to each other.

Intensity of Interference with a Constitutional Right.

For Alexy, the relevant inquiry focuses not on the "abstract weight" of principles; rather, it focuses on the intensity of interference with a constitutional right in a factual and legal matrix. That said, Alexy does not discuss at any length how to incorporate the abstract weight of principles into his Law of Balancing, given that he assumes, for his discussion, that the abstract weight of principles is equal.[22] Without a normative argument for measuring the abstract weight of principles and for their comparison, the model developed by Alexy provides little assistance if the abstract weights of principles are not equal. We are told only that abstract weights ought to be factored with concrete weights. While this directive may, from a structural standpoint, be subject to no objection, it provides little assistance to guide practical reasoning. For this reason, let us proceed (as does Alexy) on the assumption that abstract weights are equal.

Alexy argues that it is possible to devise a scale for different intensities of concrete interference and rationally to assign a position on this scale. Following the German Federal Constitutional Court, he favours a "triadic" model: light, moderate,

17. Alexy, *Theory of Constitutional Rights, supra* note 5 at 66.
18. Robert Alexy, "Balancing, constitutional review, and representation" (2005) 3 Int'l J. Con. L. 572 at 572-73.
19. Alexy, *Theory of Constitutional Rights, supra* note 5 at 68-69.
20. *Ibid.* at 102 (footnote omitted).
21. *Ibid.* at 401.
22. *Ibid.* at 408, n. 64.

and serious interference.[23] Even with this division, we are told that in some cases it will seem impossible to "distinguish light and serious."[24] These difficulties will only multiply, Alexy tells us, if a triadic model is replaced with a "nine-stage double-triadic model," where distinctions become "incomprehensible" and "exceed[] our power of understanding."[25] Because classifications must be understandable if they are to be justified, the number of "intensities" should be circumscribed.[26] Perhaps because he adopts the triadic scale developed by the German Court, Alexy provides no normative argument in favour of his choice of scale. Rather, he opposes three-grades to nine-grades in order to conclude that three is simpler to apply than nine. But even if nine-stages is problematic, Alexy does not provide an argument in favour of three rather than four or five stages. Indeed, Alexy's choice of the triadic scale does not prevent him from describing, elsewhere in his work, some interferences with rights as "not merely serious, [but] *very serious* or ... *extraordinarily serious*."[27]

Having devised a scale, Alexy attempts to demonstrate how one attributes the classification of light, moderate, or serious to an interference with a constitutional right. Alexy maintains that interferences with a principle "are always concrete interferences," which in turn means that the intensity of interference is "always a concrete quantity."[28] Assigning a classification to a concrete interference is said not to be arbitrary: reasons should be given, which include "references to facts ... and empirical regularities ... as well as normative judgments."[29]

Degree of Importance of Satisfying a Competing Principle.

In contrast to a constitutional right the pedigree of which is the constitution, Alexy maintains that a competing principle need not be found in the constitution in order to be valid and may be related "to collective interests or to individual rights."[30]

Like the intensity of *interference* with a constitutional right, the *importance* of satisfying a competing principle should be measured concretely. Yet, given that the competing principle is being promoted and not interfered with, a concrete evaluation of the importance of satisfying a competing principle is less obvious. Nevertheless, Alexy maintains a concrete rather than abstract focus.[31] To achieve this, the degree of importance of satisfying the competing principle should be measured according to the effect that *omitting* the interference with a constitutional right would have for the competing principle. Alexy argues that the same triadic scale can be applied for the competing principle as is applied for the constitutional

23. *Ibid.* at 402.
24. Alexy, "Balancing and Subsumption," *supra* note 4 at 443.
25. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 413; Alexy, "Balancing and Subsumption," *supra* note 4 at 445.
26. Alexy, "Balancing and Subsumption," *supra* note 4 at 445.
27. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 404 [emphasis added].
28. Alexy, "Balancing and Subsumption," *supra* note 4 at 440.
29. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 106.
30. *Ibid.* at 62, 80.
31. *Ibid.* at 406.

right: the importance of satisfying the competing principle is inversely proportional to the interference with the competing principle that would result if the constitutional right was not interfered with. This, we are told, positions both the competing principle and the constitutional right on the same scale.

Relationship between Constitutional Right and Competing Principle.

Let us suppose that the interference with a constitutional right is "serious" and the satisfaction of a competing principle is "not important": in such a case, the legislative measure is disproportional and, thereby, unconstitutional. Conversely, if the interference with a constitutional right is "moderate" and the satisfaction of a competing principle is "very important," the legislative measure is proportional and, thereby, constitutional. These "straightforward cases" should be contrasted with the case where the interference with a constitutional right is equal to the importance of satisfying a competing principle. In these cases, Alexy speaks of a "stalemate situation": both enacting the legislative scheme and refraining from doing so is "not disproportionate."[32] The legislature is left with a "structural discretion in balancing" insofar as both enacting and not enacting the legislative measure is not contrary to the principle of proportionality. Alexy awards no priority to the constitutional right.

Excluding cases of stalemate, one is told that the application of the principle of proportionality results in a "conditional relation of precedence" between principles, such that different circumstances could reverse the order of precedence between them.[33] A conditional relation of precedence is expressed by the following rule: given condition *c*, principle *A* has precedence over principle *B*.[34] Condition *c* identifies the circumstances relevant to identifying the degrees of interference with both principles and their position on the triadic scale. All subsequent cases between the two principles will be "subsumed" within the conditional relation of precedence if condition *c* is satisfied.[35]

Let us take two examples selected by Alexy which (he claims) demonstrate that rational judgments about intensity of interference and degrees of importance are possible according to the principle of proportionality. The first example takes the Federal Constitutional Court's decision on the constitutionality of the legislative directive to position health warnings on tobacco products.[36] According to Alexy's reading of the judgment, given that the State did not pursue "a total ban on all tobacco products," the interference with "freedom of profession" is minor.[37] As for the importance of satisfying the competing principle—decreasing the "health risks resulting from smoking"—it is very important given that the health risks are "high." This case, Alexy reports, "can well be described ... as 'obvious'" according to the

32. *Ibid.* at 410-11.
33. *Ibid.* at 50-53.
34. *Ibid.* at 53-54, 69-70.
35. *Ibid.* at 53-54, 56, 107.
36. *Ibid.* at 402, 404-405.
37. *Ibid.* at 402.

principle of proportionality: a minor interference of freedom of profession is proportional to a very important legislative objective of decreasing the health risks resulting from smoking.[38]

Yet, despite Alexy's assurances, the question of the constitutionality of tobacco product regulation is not altogether "obvious." Alexy's review of the case brushes aside a number of important considerations.[39] For example, is the health warning attributed to the State or to the tobacco advertisers? Is the cost for the health warning borne by the tobacco advertisers, the State, or the consumer? Does the size of the health warning grossly diminish the advertising space on a tobacco product? These few technical questions aim to question just how "obvious" one should consider the conclusion that the interference with freedom of profession is "minor," even if a total ban is not pursued. Another line of (non-technical) questions would challenge the political philosophy underlying the analysis. For example, would a proponent of minimalist economic regulation conclude that the State imposition of health warnings is only a minor interference with tobacco producers' freedom of profession?

Alexy's second example concerns the "classic conflict between freedom of expression and personality rights."[40] The claimant, "a paraplegic reserve officer who had successfully carried out his call-up to a military exercise," was described by a satirical magazine as a "born Murderer" and, in a later edition, as a "cripple." A lower court awarded him a considerable sum in damages. The Constitutional Court considered that the award of damages constituted a "serious interference" with freedom of expression given that, in Alexy's words, the award of "damages could reduce the future willingness of those affected to produce their magazine as they had hitherto done."[41] The competing principle—the officer's personality right—was only interfered with in a "moderate, perhaps even only ... light" manner in the case of being called a "born Murderer," given that "several persons had been described [in the magazine] as having a surname at birth in a 'recognisably humorous' way, from 'puns to silliness.'"[42] As a result, the award of damages was not sanctioned by the principle of proportionality in the case of the harm arising out of being called a "born Murderer." As for being called a "cripple," the interference with the officer's personality right was serious. According to Alexy, this classification is justified "by the fact that describing a severely disabled person as a 'cripple' *is generally taken these days* to be 'humiliating' and to express a 'lack of respect.'"[43] As a result, the award of damages was not disproportional given that the interferences with freedom of expression and with the personality right were both serious.

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38. *Ibid.*

39. For a review of some of these considerations, see Grant Huscroft, "Is the defeat of health warnings a victory for human rights? The Attorney-General and pre-legislative scrutiny for consistency with the New Zealand Bill of Rights" (2003) 14 Pub. L. Rev. 109.

40. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 403-05.

41. *Ibid.* at 403.

42. *Ibid.*

43. *Ibid.* at 404 [emphasis added].

Alexy does not identify his second example as "obvious," and for good reason. It is not clear why a "humiliating" name or one expressing a "lack of respect" qualifies an interference with one's personality right as "serious" rather than "moderate" or "light." Nor is it clear that the relevant evaluative criterion should be what something is "*generally taken these days*" to be. In addition, Alexy does not make clear the political philosophy underlying the evaluation of interference, though he does acknowledge that "the judgment that the description 'cripple' is a serious violation of personality makes assumptions about what it means to be a person and have dignity."[44]

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Alexy provides a sophisticated, though not unproblematic account of the logic of the principle of proportionality. We now turn to explore the account provided by Beatty; we will see that Beatty's work on the principle of proportionality is less structured than Alexy's and, for this reason in part, all the more problematic.

b. David Beatty's Ultimate Rule of Law

In *The Ultimate Rule of Law*, Beatty undertakes a comparative analysis of constitutional rights jurisprudence in several jurisdictions. His aim is not to set out a general theory of constitutional rights that should guide courts (a normative claim) but rather to articulate what he considers to be the overarching approach taken by courts with respect to constitutional rights (a descriptive claim). Though he fails to maintain a strict divide between normative and descriptive claims, Beatty's principle of proportionality is said to arise out of the work of judges deciding rights-claims. He purports to articulate a common methodology that courts employ in evaluating the constitutionality of legislation (and State action more generally).

Despite the central position that Beatty accords to the principle of proportionality, he spends surprisingly little time defining it. Rather, one attempts to trace a definition from his description of the case law, where one is told that different jurisdictions term the principle of proportionality differently, from "reasonableness" to "toleration" to "strict scrutiny," all (he claims) without changing its meaning.[45] Moreover, Beatty maintains that the principle is usually formulated "at the highest level of generality that the words and structure of the constitution logically support"; it consists of "'rationality" (suitability), 'necessity,' and 'proportionality' in the 'strictest' or 'narrowest' sense."[46] Mirroring Alexy's account of the principle of proportionality, Beatty maintains that his account of the principle of proportionality "serves as an *optimizing principle* that makes each constitution the best it can possibly be."[47]

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44. *Ibid.* at 405.
45. Beatty, *supra* note 3 at 163.
46. *Ibid.* at 163.
47. *Ibid.* [emphasis added, footnote to Alexy omitted].

Beatty provides some insight into his understanding of the principle of proportionality by specifying what it is *not.* He insists that it is not "just freewheeling balancing by another name" which, according to him, is a value-based exercise "of totting up a list of pluses and minuses and/or ranking the intrinsic value or importance of each" competing interest.[48] Though Beatty does not provide a definition of "balancing," one can discern that it is (according to him) "subjective," based on "a calculation of costs and benefits," a process of "cataloguing and quantifying factors," and a comparison of "incommensurables." By emphasizing facts, Beatty's principle of proportionality is different (he claims) from "balancing," though at times he (no doubt inadvertently) uses the vocabulary of balancing to describe his principle of proportionality.[49]

As explained in greater detail below, Beatty's principle of proportionality relies on the parties' own evaluation of value; contrary to Alexy's understanding, it does not rely on an external criterion of evaluation. By proceeding this way, Beatty's account of proportionality reasoning (allegedly) "avoids the subjectivity and indeterminacy that plagues interpretation and cost/benefit calculations alike."[50] Rather, Beatty claims that interests and ideas are turned into matters of *fact* rather than matters of interpretation or moral principle,[51] though he does not defend his claim that mere facts, without more, can yield normative conclusions. His emphasis on facts avoids (he thinks) the difficulty with balancing matters that are "impossible to compare," though he does not explain how facts can be compared.[52]

Even if Beatty acknowledges that his principle of proportionality "will strike a lot of people as counterintuitive, if not foolish and even regressive,"[53] he nevertheless maintains that it contains much promise for thinking about constitutional rights. One is told that the principle of proportionality is neutral in definition, is impartial "in all the required dimensions," is "all about moderation and mutual respect from beginning to end," and is able "to resolve conflicts between majorities and minorities in a way that is equally respectful of both."[54] No doubt, Beatty makes several claims that warrant investigation. My present objective is not to provide a critique of Beatty's thesis in its own right but rather to question some of the premises that sustain his model of proportionality analysis. To this end, I challenge Beatty's claim that the principle of proportionality is "objective," can be applied "impartially," and is "neutral."

The principle of proportionality is objective.

By eschewing a "balancing" approach to constitutional rights, Beatty claims that his principle of proportionality avoids struggling with the value to be assigned to

48. *Ibid.* at 74, 92.
49. *Ibid.* at 167.
50. *Ibid.* at 171.
51. *Ibid.*
52. *Ibid.* at 92.
53. *Ibid.* at 160.
54. *Ibid.* at 163, 162, 163, 160.

incomparable interests. The focus is rather on the means and effects of the law: Is it under- or over-inclusive? Are there less restrictive means available to pursue the objective? The objective pursued by the law is not questioned in this process; rather, the inquiry is supposedly "an empirical one of establishing whether there are better policy alternatives than the law the government chose to enact."[55] By emphasizing empirical evidence and the parties' own understandings of the significance of the law *for them*, the principle of proportionality is factual; it is therefore objective in the sense that it does not (according to Beatty) require evaluation: the facts speak for themselves.[56] Beatty is adamant that this process is possible: if a judge lets the facts and the parties speak for themselves, the judge will "know just by looking, just by sight" which answer is correct.[57] The pragmatic focus on facts purports to transform the evaluations of value in moral philosophy into questions of fact.[58] Yet, in reading *The Ultimate Rule of Law*, one quickly comes to the conclusion that "facts speak to Beatty more clearly than they [do] to [his] readers."[59]

The principle of proportionality can be applied impartially.

When applying the principle of proportionality, one is told that one should avoid putting forward one's own views and should be guided by the "words and deeds" of the people affected.[60] Otherwise, one is partial and is making an evaluation of the facts rather than proceeding by deductive reasoning. This does not, for Beatty, reduce the role of the person applying the principle of proportionality to that of performing a "mindless, mechanical exercise."[61] The principle of proportionality is not self-enforcing: it provides a formal framework of analysis that structures the analysis to be performed. The person applying the principle is responsible for organizing and evaluating conflicting factual claims in a manner that "respects the interests of everyone who is before the Court."[62] Should a judge remain detached from "the substantive values" at stake in a case and look to the evidence with care, Beatty maintains that "the right answer is usually pretty clear."[63] The right answer is less clear and mistakes occur when one allows one's own evaluation of the significance of a law to influence the analysis.

Beatty's model assumes that a judge evaluates the parties' own statements about the importance of the effects of a law for them.[64] Yet, for Beatty, in some cases the judge's assessment should be substituted for the parties' own assessment of how a law affects them. First, Beatty maintains that a judge should make an evaluation

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55. *Ibid.* at 92.
56. *Ibid.* at 92, 172, 184.
57. *Ibid.* at 73.
58. *Ibid.* at 170.
59. Richard A. Posner, "Review Article: Constitutional Law From a Pragmatic Perspective" (2005) 55 U.T.L.J. 299 at 302-03.
60. Beatty, *supra* note 3 at 94, 167.
61. *Ibid.* at 98.
62. *Ibid.*
63. *Ibid.*
64. *Ibid.* at 184.

of the significance of a law *in lieu* of the parties' evaluation when the parties are "too caught up in a case and so liable to exaggerate their claims" (Beatty does not explain when parties to a dispute *do not* exaggerate their claim) or when the parties' evaluation of the effects of a law is influenced by their prejudice with respect to a certain group or issue.[65] Beatty does not explain how judges can know whether the parties are exaggerating their claim or are resting their claim on prejudice without, *in the first instance*, breaching his condition that judges refrain from evaluating for themselves the importance of the effect of law on each party.

Second, Beatty at times contends that "proportionality requires judges to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of *those who reap its greatest benefits* and *those who stand to lose the most.*"[66] Unless Beatty assumes that the parties before a judge will always be those most affected by the law, a judge cannot focus the analysis to the parties before the court *and* evaluate the law from the perspective of those most affected. Moreover, in order to determine who is most affected by the law, the judge must breach Beatty's condition that the judge refrain from evaluating the importance of the effect of a law.

Third, Beatty at times suggests that a judge should evaluate facts from the perspective of the "community." When discussing the question of abortion, Beatty maintains that judges "have no authority to second-guess how a community thinks about the deep philosophical and spiritual meanings of life."[67] The judge should respect the value choices of the community and, one surmises, take this as a "social fact" (and not as a "normative commitment") in applying the principle of proportionality. Beatty does not explain how a judge would apply the principle of proportionality in a case where parties before a court differ markedly from the community's "value choices." Moreover, Beatty appears to assume away the possibility that the members of a community are deeply divided on a given question, *like abortion.* Although Beatty gives the community a role in informing the proportionality analysis when it comes to the abortion debate, he dismisses "popular opinion" and the "feelings" of "a majority of people" when it comes to the same-sex marriage debate.[68]

The principle of proportionality is neutral.

Beatty maintains that judges applying the principle of proportionality can avoid committing themselves to a given philosophy of political morality. He argues that it matters not whether the constitutionality of a law is challenged as being contrary

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65. *Ibid.* at 168, 114-15.
66. *Ibid.* at 159-60 [emphasis added].
67. *Ibid.* at 167.
68. *Ibid.* at 114-15. For a review of the debate that goes beyond "popular opinion" and "feelings," see Graham Gee, "'Same-Sex Marriage in Massachusetts: Judicial Interplay between Federal and State Courts" [2004] P. L. 252; Graham Gee & Grégoire C. N. Webber, "Same-Sex Marriage in Canada: Contributions from the Courts, the Executive, and Parliament" (2005) 16 King's College L. J. 132; Graham Gee & Grégoire C. N. Webber, "A Confused Court: Equivocations on Recognizing Same-Sex Marriage in South Africa" (2006) 69 Mod. L. Rev. 831.

to liberty or equality or any other right: rights all share a "common structure and, as a practical matter, mean exactly the same thing."[69] The test of constitutionality, irrespective of the constitutional right—in fact constitutional rights hold no "special status" for Beatty[70]—amounts to evaluating the ends, means, and effects of legislation according to the principle of proportionality. One is told that this is a fact-based inquiry that can proceed independently of political morality.

For Beatty, the "neutrality" of the principle of proportionality does not mean that it is "value free."[71] Rather, the principle of proportionality assumes that each participant is equal to all the others; moreover, each point of view carries equal moral weight. Though there is some ambiguity as to who counts as a participant in Beatty's model (is it a party before a court, the most affected parties, or the community at large?), whoever does participate is entitled "to have its position evaluated fairly and according to the evidence that shows it in the best possible light."[72] Beatty does not defend the claim that in applying the principle of proportionality one can avoid committing oneself to a political morality or to a conception of rights; he asserts this without questioning whether his model is itself so committed. In particular, he does not defend the contentious assertion that the principle of proportionality, as a theory of constitutional rights, prescribes "virtually anything in moderation but nothing to excess."[73]

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This summary review of the scholarship of Alexy and Beatty has sought to explore what these scholars take to be the promise of the principle of proportionality. Their two studies have undertaken a sustained and engaged defence of—but not a challenge to—the principle of proportionality which animates the received approach to the limitation of rights. By no means exhaustive of the range of opinions held by the academy, Alexy's and Beatty's support of proportionality reasoning with respect to rights is in many respects illustrative, even if not comprehensive, of constitutional rights scholarship and jurisprudence. The targeted criticisms of their approach to constitutional rights reasoning outlined above have sought to challenge their own accounts of the principle of proportionality. However, because the principle of proportionality is espoused by other scholars and by many courts, criticisms of a more general nature should be explored; criticisms that speak to the principle of proportionality itself rather than to its many proponents. In short, criticisms that challenge the cult of constitutional rights scholarship.

2. Challenging the Cult of Constitutional Rights Scholarship

Be it at the level of the European Court of Human Rights, the Federal Constitutional Court of Germany, the British House of Lords or Privy Council, the Supreme Court

69. Beatty, *supra* note 3 at 116.
70. *Ibid.* at 171.
71. *Ibid.* at 172.
72. *Ibid.*
73. *Ibid.* at 176.

of Canada, the Israeli Supreme Court, or in any number of other jurisdictions, the principle of proportionality seems to have achieved the status of a received idea. Indeed, rights scholarship and jurisprudence do not, for the most part, fundamentally challenge the received approach: few question the assumptions on which it is based or whether it should be rejected in favour of an altogether alternative approach. As a consequence, we have come to see constitutional rights only through the prism of proportionality and balancing and now fail to grasp the possibility that alternative modes and methods of reasoning are even available.

Now, although the principle of proportionality is more or less unanimously endorsed, important disagreements result when it is applied to a given limitation. Even with this fruitful basis for investigating its structural assumptions and philosophical commitments, jurisprudence and scholarship accept the soundness of proportionality and balancing, devoting themselves to correcting judicial decisions in order to reconcile better the theory and practice of balancing competing interests and values. Despite disagreeing with Alexy on several points, I endorse without qualification his evaluation that "[t]he phenomenon of balancing in constitutional law leads to so many problems that [one] cannot even provide a list of them here."[74] The challenges here explored against the principle of proportionality are four-fold: the principle of proportionality (a) attempts to depoliticize constitutional rights, (b) runs afoul the incommensurability challenge, (c) does violence to the idea of a constitution, and (d) denies categorical answers.

a. Depoliticizing Constitutional Rights

The principle of proportionality attempts to depoliticize rights by purporting to turn the moral and political evaluations involved in delimiting a right into technical questions of weight and balance. Yet, the attempt to evade the political and moral questions inherent in the process of rights reasoning is futile. Even within a proportionality framework, identifying the interests that are to count and determining their weight cannot proceed apolitically and amorally. Arguments about constitutional rights cannot be transformed into management and mathematical measurement.

The assumption that the identification of interests can be divorced from political judgment either results from including all interests asserted by anyone to be relevant or brushes aside the prior question as to who is identifying the "relevant" interests and according to what standard or criterion. The first alternative, which—it must be recognized—is itself a political choice, finds favour with Alexy and Beatty. Although Alexy maintains, somewhat equivocally, that a principle may be invalid, his definition of an invalid principle is of a principle deserving little weight.[75] As a result, all principles, one gathers, qualify. Beatty, for his part, argues that each point of view carries equal moral weight.[76]

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74. Alexy, "Balancing, constitutional review, and representation," *supra* note 18 at 573.
75. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 61-62.
76. Beatty, *supra* note 3 at 172.

The decision to include all interests makes no room for the assertion that some interests are ill-founded or worthless or vicious or inhuman or irrelevant. It does not allow one to deny that every interest counts, every claim should be valued, every argument weighed; it makes no room for the assertion "your interest does not count," "your claim is valueless," "your argument is weightless." It denies that a justified political decision can assert certain interests to be irrelevant or deserving of no weight. Indeed, why should the view-points of those who proceed uncritically or out of an interest for power and reward be valued equally with those who are reflective and concerned with truth, reasonableness, and virtue? Should not these former perspectives be rejected "for the sake of discourse (not demagoguery), truth (not mendacious or myth-ridden propaganda), friendship (not self-seeking flattery), and the *real* interests of all (including those wrongly interested in adhering to and acting upon their immoral 'perspectives')"?[77]

The alternative is also problematic as it fails to appreciate that the identification and formulation of the "relevant" interests can determine the outcome of the balancing or proportionality exercise. The many choices involved in making determinations of interest and weight highlight the importance of identifying *who* determines the interests subject to a proportionality analysis and on *what grounds* these decisions are made. For example, if it is the court that identifies the relevant interests (as both Alexy and Beatty assume), then why should the interests of the parties before the court be privileged over the interests of others equally affected by the outcome of the decision? Although the principle of proportionality need not be concerned exclusively with the parties before the court, proponents of the principle of proportionality often prefer to simplify matters and assume only *two* "competing interests." Few rights-claims can fairly be so reduced, as the issues involved are often polycentric. In addition to the difficulties with this gratuitous simplification, why should someone with legal training (like a judge)—as opposed to someone with a sociological, political, or other orientation—perform the proportionality analysis?

In response to concerns of this kind, there are attempts to externalize the evaluation of weight by looking to "facts" (*per* Beatty), to "the constitution" (*per* Alexy), or to what "history, tradition, and current society"[78] attribute to the interests. Beatty does not seem to appreciate that facts cannot speak for themselves. Facts carry no normative weight and yield no normative conclusion without *a judge* (understood here not in the narrow sense of someone holding judicial office) to assign them meaning by appealing to a conceptual framework. The weight to be given to a "fact" is, in constitutional law, a matter of political judgment and not subject to evidentiary proof. Moreover, not all relevant considerations can be "proved"; some questions of political morality are to be asserted and justified without being evidence-based. Where legislation rests (as it usually does) on moral-political commitments, the delimitation of rights proceeds by way of argument and justification, not measurement.

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77. John Finnis, "Natural Law and the Ethics of Discourse" (1999) 12 Ratio Juris 354 at 357 [emphasis in original, footnote omitted].

78. Aleinikoff, *supra* note 2 at 962-63.

Alexy looks to the constitution as a guide for identifying the relevant interests and their weight. Yet, it is far from clear how open-ended references to "life, liberty, and security of the person," the "principles of fundamental justice," and "freedom of association" disclose a single political philosophy (or, assuming a single political philosophy, a single reading of that philosophy). This does not deny that an interpreter could provide a coherent account of the political philosophy of a given constitution. The point here is that an interpreter must approach the political nature of this task with political philosophy in hand; a constitution will not speak for itself. Much the same can be said of "history, tradition, and current society." In short, balancing cannot be a descriptive exercise; if it is at all possible, it is inescapably a normative undertaking.

Here, Alexy would appear to agree.[79] He explains that "a balancing of principles is rational when the preferential statement to which it leads can be rationally justified."[80] Unfortunately, Alexy says little more about his understanding of justification. He directs the reader to no other part of *A Theory of Constitutional Rights* nor to any other of his writings. Proceeding by way of justification acknowledges that the balancing process is not self-evident and that it involves, at a minimum, the making of judgments and choices informed by commitments to political morality, which should be supported by good reasons. In other words, proceeding by way of justification embraces a normative rather than technical vocabulary that acknowledges the necessity of providing good and sufficient reasons for the identification of "interests" and their "weight."

If proponents of the principle of proportionality openly maintained that a proportionality analysis merely identifies the skeleton according to which an argument should proceed,[81] they would avoid many of the preceding criticisms, but only to weaken the place of the principle of proportionality in constitutional theory and practice. If the principle of proportionality is merely a formal structure for argument, then alternative structures are possible, and—as will be suggested in the conclusion—structures that avoid the language of interest, cost, weight, and balance may represent better a moral understanding of rights.

In sum, neither facts, nor the constitution, nor history are imbued with fixed meaning or come tagged with a stipulated weight for balancing. Different persons will associate different weights to interests on the basis of their moral-political commitments. To assume a "neutral" answer is to assume a shared world-view or political philosophy such that the contested and contingent political choices involved in assigning value or weight to interests are not acknowledged. Unless one is speaking only with one's "friends" (that is, with those who share the same world-view or political philosophy), the absence of unanimity in evaluating the weight to be assigned to an interest, or the importance—for the constitution, tradition, history, or current society—of a right is immediately apparent. To acknowledge this is not to engage with moral relativism. Each one of us can appreciate

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79. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 109, 405.
80. *Ibid.* at 100-01 [footnote omitted].
81. See, e.g., Vicki C. Jackson, "Being Proportional about Proportionality" (2004) 21 Constitutional Commentary 803 at 829-30.

the judgments and choices that must be made in evaluating a rights-claim. Contrary to being a technical evaluation, the question of the weight of an interest cannot be answered without substantive evaluations and moral judgments and, thus, without contest and controversy.

b. The Absence of a Common Criterion for Optimization

Proponents of the principle of proportionality rarely identify a common criterion for evaluating the weight of an individual interest and the weight of the conflicting community interest. Perhaps this is explained by the fact that the relevant task is said to be optimization, not maximization. In other words, one is not directed to identify a value that ought to be maximized and to give effect to the competing interests in a manner that maximizes that value. Rather, one is directed to optimize both a constitutional right and a competing principle. But according to what standards is one to measure the optimization of a constitutional right and a competing principle? And does the identification of these standards run afoul the incommensurability thesis?

Incommensurability is a contested concept.[82] The challenge here levelled focuses on the idea of a "common measure"; namely, that two options are incommensurable when it is not appropriate to evaluate both options according to a common measure. A more complete account provides:

> Option *A* is commensurable with option *B* if and only if there is a valuation measure of more and less, and some however complex property *P* that is correlative with choice and rationally antecedent to choice and rationally determinant of choice, such that *A* and *B* can be *exhaustively compared* by the said measure in respect of being more *P* and less *P;* where an exhaustive comparison in respect of *P*-ness is a comparison in respect of *everything that matters* about either *A* or *B*.[83]

To say that it is "not appropriate" to evaluate two options according to a common measure is to say that applying a common measure to one or both options would distort, transform, or misrepresent the value, importance, or quality of that option. Stated otherwise, the measure would fail to capture adequately "everything that matters" about the option being considered.

Appealing to what he terms "the constitutional point of view," Alexy attempts to avoid identifying a single measure that would fail to capture everything that matters about a constitutional right or competing principle. He claims that the importance of constitutional rights and competing principles can be evaluated in relation to *the constitution*, which provides "a common point of view" and "indirectly leads to their comparability."[84] He maintains that the triadic scale (light, moderate, serious) he develops for interference with a principle provides an answer to the claim that

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82. For a helpful review, see Ruth Chang, ed., *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, MA: Harvard University Press, 1997).

83. David Wiggins, "Incommensurability: Four Proposals" in Ruth Chang, ed., *ibid.* at 53 [emphasis added].

84. Alexy, "On Balancing and Subsumption," *supra* note 4 at 442.

constitutional rights and competing principles are incommensurable. Alexy accepts that this will not replace disagreement with respect to the outcome of balancing; nevertheless, he argues that disagreement will be about what is correct according to the constitutional point of view.

Alexy's account is unconvincing. To put the point absurdly, if one were to point to "the good life" as the relevant point of view, constitutional rights and competing principles would not thereby become any more commensurable. In order for the constitution to assist in rendering commensurable the different principles involved in balancing, the constitution should provide for the triadic scale Alexy develops or it should provide guidance for how to classify degrees of interference. Apart from the other objections to these alternatives, it is not clear how the constitution can assist in determining the classification of degrees of interference unless both principles in the balancing exercise have their pedigree in the constitution. Yet, Alexy allows for the competing principle to be either "contained in the constitution or admitted by it as a reason for interference."[85] Should it follow that because a competing principle is admitted by the constitution that the constitution can therefore settle whether an interference with that principle is light, moderate, or serious? Alexy provides no argument in the affirmative.

In addition, given that the measure of the intensity of interference with a principle is evaluated for each principle *without comparison* with the other principle, one should not assume that a light interference with one principle is of the same measure as a light interference with another principle. Without examining the reasoning of the Supreme Court of Canada, let us take the question explored in *Syndicat Northcrest v. Amselem* to illustrate why.[86] In that case, members of the Jewish faith made a religious claim for the setting up of a "succah"[87] on the balcony of their co-owned property for nine days a year. The contract regulating their use of the co-owned property prohibited anything that would compromise aesthetic harmony.

Given the expansive definition of religious freedom provided by the Court—"the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking"[88]—the setting up of a succah for the pursuit of a religious belief clearly falls within the scope of the constitutional guarantee. Let us assume for the purposes of this exercise that the setting up of the succah is a non-obligatory religious precept of the Jewish faith. As a consequence, interference with this precept is, let us assume, "light." The competing principle pursued by the administrators of the co-owned property is aesthetic harmony. Let us assume that, if the claimants proceed to set up their succahs, the intensity of interference with this principle is "light,"

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85. Alexy, "Constitutional Rights, Balancing, and Rationality," *supra* note 11 at 138; Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 80-81.

86. *Syndicat Northcrest v. Amselem.* [2004] 2 S.C.R. 551.

87. The following definition is provided in the judgment: "A succah is a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens, in which, it has been acknowledged, Jews are commanded to 'dwell' temporarily during the festival of Succot, which commences annually with nightfall on the fifteenth day of the Jewish month of Tishrei": *ibid.* at para. 5.

88. *Ibid.* at para. 46.

given the short period of time of the religious celebration (nine days) and the small number of erected succahs (a few claimants). Would it follow that both "light" interferences are commensurate? Of course not. In both cases, evaluating whether the interference is light, moderate, or serious is undertaken by comparing more or less serious interferences with religious freedom and aesthetic harmony, *respectively.* In other words, *because* the religious precept in play is not obligatory, the interference is light; *because* the duration of the interference with the aesthetic uniformity of the building is only temporary, the interference is light. The measurement of the interference in both cases is taken only from the perspective of the principle being evaluated. As a result, even if the abstract values of aesthetics and religious freedom were the same (a proposition here neither confirmed nor denied), it would not follow that a light interference with one is equivalent to a light interference with another. Given that the principle of proportionality does not seek *to maximize* some value, but rather *to optimize* competing principles, no common measure is appealed to and, thus, no comparison of the intensity of interference of one principle with another is possible.

For full commensurability to be possible—for the costs and benefits of alternative options to be fully measured—it must be the case that "(1) goals are well-defined, (2) costs can be compared by references to some definite unit of value (for example, money), (3) benefits too can be quantified in a way that renders them commensurable with one another, and (4) differences among the means, other than their measurable costs, measurable benefits, and other aspects of their respective efficiency as means, are not counted as significant."[89] These conditions apply in the technical domain, not in moral reasoning. If they did, "morally significant choice would be unnecessary and ... impossible [given that] one option could be shown to be *the best* on a single scale which, as all aggregative reasoning does, ranks options in a single, transitive order."[90] But the moral and political choices that must be made in relation to constitutional rights reveal a surplus of valuations, not a single metric. Following Finnis, one should say that in the absence of a measure to commensurate the intensities of interference of one principle with those of another principle, the instruction given by the principle of proportionality to balance or to weigh "can legitimately mean no more than 'Bear in mind, conscientiously, all the relevant factors, and *choose.*'"[91] Without an identified common measure, the principle of proportionality cannot direct reason to an answer. It can merely assist reason in choosing between incommensurables.

One might object to this incommensurability challenge and maintain that choices *must be* commensurable: otherwise, no rational decision is possible. At least two answers to this objection are available.

First, it does not follow that because two principles, interests, or values are incommensurable that we cannot, or indeed do not—as the colloquial expression

89. John Finnis, "Commensuration and Public Reason" in Ruth Chang, ed., *supra* note 82 at 219; John Finnis, "Natural Law and Legal Reasoning" in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) at 146.

90. Finnis, "Natural Law and Legal Reasoning," *ibid.*

91. *Ibid.* at 145.

suggests—"weigh" or "balance" reasons in coming to a conclusion.[92] Though the language of balancing reasons (in common parlance) is similar to the language of balancing interests (according the principle of proportionality), it is erroneous to equate the two. The shorthand reference to "balancing reasons" for describing practical reasoning does not make the same claim to precision and conclusiveness as does the principle of proportionality. To weigh or to balance reasons may involve an examination of the advantages and disadvantages of available alternatives, but this is not to devise a common scale of evaluation, to assign a value, and to weigh in the technical sense. Rather, in holding the relevant reasons in one's mind, one proceeds according to the reason that is, in one's judgment, the most compelling and—in colloquial terms—one identifies that reason as the "weightier" one.[93]

If two options are incommensurable, reason cannot adjudge their relative value. But this is not an imperfection of the reasoning process. Indeed, it is a "mere technocratic illusion"—no doubt encouraged by the cult of constitutional rights scholarship—"to suppose that a choice not guided by cost-benefit computations must be arbitrary."[94] One should not assume that "there is a true value behind the ranking of options, and that the ranking is a kind of technique for measuring this value"; rather, where incommensurability obtains, there "is nothing further behind it."[95] Yet, this does not make one impotent when confronted by two incommensurable options. Often, there are good reasons for two (or more) options but not for choosing between them. Any one alternative can be *supported* by good reason even if the choice between alternatives is not *determined* by reason. Following Raz, one should say that "[r]ational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others."[96] In this sense, though the choice between alternatives is sometimes said to be "irrational" in the sense of arbitrary, it is rather more accurate to say that it is underdetermined by reason: reason provides the parameters for making the decision but leaves to the author of the decision a *choice*. Reason supports both alternatives, makes them both rationally appealing but does not support one as better than the other; it "does no more (and no less) than hold the ring, disqualifying countless 'solutions' as contrary to reason and wrong, but identifying none as *uniquely* right."[97]

The importance of choice is not undermined by what Finnis aptly identifies as "a feature of the experience of choice"; namely, that "[*a*]*fter* one has chosen, the factors favouring the chosen option will usually seem to outweigh, overbalance, those favouring the rejected alternative options."[98] Merely because with the aid of hindsight one reasons "backwards," so to speak, and convinces oneself that the choice made

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92. See Joseph Raz, *Practical Reason and Norms*, rev. ed. (Oxford: Oxford University Press, 2002).
93. See Frantz, *supra* note 9 at 1434-35.
94. John Finnis, *Fundamentals of Ethics* (Oxford: Clarendon Press, 1983) at 91; Steven Lukes, "Comparing the Incomparable: Trade-offs and Sacrifices" in Ruth Chang, ed., *supra* note 82 at 186-87.
95. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) at 327; Cass R. Sunstein, "Incommensurability and Kinds of Valuation: Some Applications in Law" in Ruth Chang, ed., *supra* note 82 at 241.
96. Raz, *ibid.* at 339.
97. Finnis, "Commensuration and Public Reason," *supra* note 89 at 232.
98. Finnis, "Natural Law and Legal Reasoning," *supra* note 89 at 145.

was rationally determined, it does not follow that at the moment of choosing reason was potent to select between the alternatives. Nevertheless, one may provide a good explanation for this feature of the experience of choice: once made, the choice between the alternative options *establishes* an answer *for the chooser.* When confronted with a similar "choice" again, it *becomes* obvious to the chooser what alternative should be favoured *now* that an answer has been established.

A second (related) answer to the claim that the incommensurability thesis prevents rational choices from being made is to withdraw the debate altogether from a proportionality framework. The incommensurability challenge here formulated identifies as its target the widespread assumption that balancing and proportionality proceed mathematically and technically. The challenge, of course, does not question the availability of reason in guiding rights reasoning. Indeed, many components of the reasoning process allow for commensurability. The following sets are all commensurable and should be recognized as such: truth and untruth, attention and inattention to evidence, insight and stupidity and oversight, sound and unsound reason.[99] Moreover, where legislative scheme x has all the benefits of legislative scheme y but the former interferes less with a valid interest, the two schemes are commensurable and reason dictates that legislative scheme x be preferred. But reason cannot determine the choice between different schemes where there are multiple criteria for evaluation: for example, where legislative scheme x, whilst interfering less with a valid interest, has some but not all of the benefits of legislative scheme y.

c. Doing Violence to the Idea of a Constitution

If one accepts that at least one of the aims of a constitution is to secure the political legitimacy of the State, the principle of proportionality does violence to the idea of a constitution. One of the ends of a constitutional right is to demarcate acceptable from unacceptable State action; this demarcation may be necessary to secure the political legitimacy of the State. Yet, if a right guaranteed by the constitution serves as little more than as an interest to be optimized, a constitutional right provides no strict demarcation against unacceptable State action. With the principle of proportionality, so long as the benefit to the interest promoted by legislation outweighs the "cost" to the constitutional right, "[a]nything which the Constitution says cannot be done can be done."[100] In this sense, the constitution provides no injunction "you shall not pass"; at best, the constitution suggests: "pass if you must, but do so proportionally."[101] Given that for Beatty, the principle of proportionality "makes the concept of rights almost irrelevant" or outright "disappear"[102] and that for Alexy rights are merely "prima facie requirements,"[103] the very enterprise of

99. Finnis, "Commensuration and Public Reason," *supra* note 89 at 217.
100. Frantz, *supra* note 9 at 1445.
101. See *ibid.* at 1449.
102. Beatty, *supra* note 3 at 160, 171.
103. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 57. For a similar criticism, see Bradley W. Miller, "Justification and Rights Limitation" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008).

constitution-making could be simplified by enacting a single proposition: "The legislature shall act in accordance with the principle of proportionality."

There is an important moral loss if constitutional rights are conceived only by reference to the contingent weight of the interests they promote. In the case of free expression, and likely in the case of many other rights, "[t]he attitude toward freedom of speech which encourages uninhibited discussion" is liable to be lost.[104] Even if one were to suppose that the principle of proportionality protects more expression than would a narrow but stated definition of freedom of expression, the latter approach allows for a different attitude to develop. One may claim freedom of expression and rely on it without concern for the possibility that the court will subsequently conclude that the balance of interests favoured the absence of expression. Under the principle of proportionality, the scope of freedom of expression may never be clear, it may never be fully defined. Whether one has a right to expression "cannot be known until after the event and [may] depend[] on the unpredictable weight which a court may someday give to 'competing interests.'"[105]

By contrast, when a right is defined, we might say that one draws a line—a demarcation, a limitation—between acceptable and unacceptable State action. The line may be "wavering and uncertain" at many points and any number of cases may compel one to conclude that it has been drawn "in the wrong place and that it should be moved"; moreover, "no matter how satisfactorily the line is drawn, borderline cases can still arise which could arguably be placed on either side."[106] But despite these difficulties, the mere drawing of a line posits some cases on one side, and other cases on the other. And in so doing, certainty is achieved in what the right guarantees.

The claim that the principle of proportionality does violence to the idea of a constitution does not depend on the assumption that a constitution's meaning is readily discernable. Underspecified rights must undergo a process of delimitation. Yet, the claim is that once a right is delimited, one should resist attempts by proponents of the principle of proportionality to transform the right into a principle to be optimized. Once delimited, a constitutional right may be considered to be an exclusionary reason. By contrast, the principle of proportionality transforms any strict demarcation into a permeable demarcation, resisting unacceptable State action only insofar as it does not satisfy the principle of proportionality. The constitutional rights' guarantee becomes a guarantee against disproportional State action; it loses its claim to being a guarantee against unacceptable State action, irrespective of what the principle of proportionality might otherwise suggest.

d. Denying Categorical Answers

The principle of proportionality denies categorical answers to rights-claims. Every answer to a claim is contingent on the optimization of the constitutional right. There

104. Frantz, *supra* note 9 at 1443.
105. *Ibid.*
106. *Ibid.* at 1435.

can be no categorical assertion, for example, that the State should not torture a person. That may always be the conclusion that one comes to under the principle of proportionality, but that conclusion is always conditional on the optimization of one's right against being tortured in the light of the circumstances surrounding the proposed recourse to torture. In fact, one proponent of the principle of proportionality advocates not only that the State should not be prohibited from using torture but also that, according to the principle of proportionality, there may be circumstances where the State should actively make use of torture.[107] According to this approach, any explicit constitutional prohibition of torture is translated from a categorical prohibition to an optimization principle. On Alexy's account, the principle of proportionality is too formal and makes too few substantive commitments to resist the possibility that torture will be sanctioned, let alone slavery or the murder of innocents. Indeed, Alexy maintains (somewhat astonishingly) that "the conviction that there must be rights which even in the most extreme circumstances are not outweighed ... cannot be maintained as a matter of constitutional law."[108]

Not dissimilarly, the Supreme Court of Canada refuses to conclude categorically that the rights to life and security of the person under the *Canadian Charter of Rights and Freedoms* prevent the State from extraditing individuals to a country where they could face the threat of torture. In *Suresh v. Canada*,[109] the Court would not exclude "the possibility that in exceptional circumstances" it "might be justified ... as a consequence of the balancing process mandated ... [in] the *Charter*" to extradite an individual in these circumstances.[110] According to the principle of proportionality, the right to torture—like all constitutional rights—has no "hard core."[111] It guarantees nothing categorically. Indeed, it is only by rejecting the principle of proportionality altogether following a line of argument similar to that adopted by the European Court of Human Rights in *Chahal v. United Kingdom* that a categorical answer is possible.[112] Acknowledging "the immense difficulties faced by States in modern times in protecting their communities from terrorist violence," the European Court (albeit uncharacteristically) resisted appealing to the principle of proportionality with regards to the right against torture.[113] As a result, it was not necessary for the European Court "to enter into a consideration of the Government's untested, but no doubt bona fide, allegations about the ... applicant's terrorist activities and the threat posed by him to national security."[114] Nor was it necessary for the Court to consider that the deporting State in no way shared any purpose of torturing, and did all it could to lessen the probability of torture following deportation. Recourse to torture was categorically prohibited. End of inquiry.

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107. Winfried Brugger, "May Government Ever Use Torture? Two Responses from German Law" (2000) 48 Am. J. Comp. L. 661.
108. Alexy, *Theory of Constitutional Rights*, *supra* note 5 at 196.
109. *Suresh v. Canada.* [2002] 1 S.C.R. 3.
110. *Ibid.* at para. 78.
111. Frantz, *supra* note 9 at 1440.
112. *Chahal v. United Kingdom.* (1996) 23 E.H.R.R. 413.
113. *Ibid.* at para. 79.
114. *Ibid.* at para. 82.

3. Conclusion

With few exceptions, State constitutions and international conventions do not make any reference to the principle of proportionality or to balancing and, notwithstanding the formidable jurisprudence suggesting the contrary, there is nothing intrinsic to rights that would direct one to associate the ideas of proportionality and balancing with the process of practical reasoning.

Given that constitutional law is now firmly settled in the age of balancing, it takes almost an act of will to step back and to appreciate that there are different conceptions of constitutional rights reasoning. Yet, one need not look far to find conceptions of rights reasoning that differ from the principle of proportionality. Nozick tells us: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."[115] For Rawls: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[116] For Habermas: "if in cases of collision *all* reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses."[117] For Waldron: "To believe in rights is to believe that certain key interests of individuals, in liberty and well-being, deserve special protection, and that they should not be sacrificed for the sake of greater efficiency or prosperity or for any aggregate of lesser interests under the heading of the public good."[118] And for Dworkin: "There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient."[119] Although the theories of rights proposed by Nozick, Rawls, Habermas, Waldron, and Dworkin all differ in important respects, none of them explicitly or unabashedly endorses the principle of proportionality or balancing as an inherent part of their account of rights. They do not employ the vocabulary of "optimization" and "minimal impairment" and "justifying infringements" and "cost-and-benefit." Rather, rights-claims under their respective theories aspire to something closer to exclusionary force.

By highlighting these available, different conceptions of rights and the associated process of practical reasoning, I aim to highlight that the contemporary embrace of the principle of proportionality should be questioned, if not also abandoned. Constitutional rights scholarship should seek to cleanse itself of the yoke of the contemporary cult of rights reasoning and aspire to struggle more explicitly with the moral and political reasoning inherent to all rights. The danger of neglecting to redirect efforts in this way is nothing short of the loss of the vocabulary of rights.

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115. Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974) at ix.
116. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 3.
117. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 2004) at 258-59.
118. Jeremy Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 Oxford J. Legal Stud. 18 at 30.
119. Ronald Dworkin, *Taking Rights Seriously*, new impression (London: Duckworth, 2000) at 193.

Not only do scholars like Beatty and Alexy understand this as a consequence of the principle of proportionality, the lexicon of "competing interests" employed by courts everywhere, even when a *right* is alleged to be in play, discloses, consciously or not, that rights are nothing worthy of special mention. Under the cult of constitutional rights scholarship and jurisprudence, rights have become merely one reason among others juggled in a process of proportionality reasoning. The result is perhaps nothing short of a loss of rights.